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IN THE

**Supreme Court of the United States**

OCTOBER TERM 1976

**76-660**

**No. A-267**

HUMANE SOCIETY OF THE UNITED STATES,  
NEW JERSEY BRANCH, INC., *et al.*,

*Appellants,*

*v.*

NEW JERSEY FISH AND GAME COUNCIL, *et al.*,

*Appellees.*

**On Appeal from the Supreme Court of New Jersey**

**JURISDICTIONAL STATEMENT**

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November 10, 1976



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*Appellants,*

*vs.*

NEW JERSEY FISH AND GAME COUNCIL, *et al.*,

*Appellees.*

On Appeal from the Supreme Court of New Jersey

**JURISDICTIONAL STATEMENT**

Appellants appeal from a final judgment of the Supreme Court of New Jersey, entered on July 15, 1976, which sustained the constitutional validity of N.J.S.A. 13:1B-24. This statement is submitted to show that the Supreme Court of the United States has jurisdiction over this appeal and that a substantial question is presented.



### Opinions Below

The majority and dissenting opinions of the Supreme Court of New Jersey are reported at 70 N.J. 565 and — A.2d —. The opinion of the trial court which found the statute unconstitutional is reported in 129 N.J. Super. 239, 322 A.2d 841 (Ch. Div. 1974). These opinions are attached hereto as Appendix A.

### Jurisdiction

This suit was brought in State court under the Fourteenth Amendment to the United States Constitution in order to have N.J.S.A. 13:1B-24 declared unconstitutional and have its enforcement enjoined. The judgment of the Supreme Court of New Jersey was filed on July 15, 1976 and a notice of appeal was filed in that court on September 29, 1976. The jurisdiction of the United States Supreme Court to review this judgment by direct appeal is conferred by 28 U.S.C. §1257(2). The statute sustained in this case is N.J.S.A. 13:1B-24, the full text of which is set out in Appendix B to this statement. The notice of appeal is attached hereto as Appendix C.

### Questions Presented

1. Does a state statute requiring that the membership of the New Jersey Fish and Game Council be limited to six sportsmen nominated by a federation comprised almost exclusively of hunters and fishermen, three farmers nominated by an agricultural organization and two commercial fishermen, violate the Equal Protection clause of the Fourteenth Amendment where such restrictions deny

membership on the Council to otherwise qualified conservationists and where this Council substantially regulates the public trust property in wildlife and public lands.

2. Does the delegation of the right to nominate nine of the eleven councilmen to two special interest organizations deprive appellants of property rights without due process of law by arbitrarily denying them the opportunity to assist in administering a public trust corpus from which they actively derive beneficial enjoyment.

### Statement of the Case

Appellants Humane Society of the United States, New Jersey Branch, Inc. and the Sierra Club are private, non-profit membership organizations whose memberships consist of hikers, campers and others who enjoy wildlife and the outdoors for purposes of other than hunting, fishing and farming. The New Jersey Branch of the Humane Society of the United States has some 10,000 members in New Jersey while the Sierra Club with chapters all over the United States has some 140,000 members nationally of whom 2,500 reside in New Jersey. Qualified members of both these substantial organizations would like to serve on the Fish and Game Council in order to influence State wildlife policy. They are effectively denied the opportunity for service by the statutory restrictions challenged in this case.

Plaintiff Hermina Andrews is knowledgeable about wildlife but her request to be considered for a seat on the council was rejected by an assistant to the Governor since she failed to meet the statutory qualifications. Plaintiff Fred Ferber owns a substantial tract of forested land in North Jersey whose use as a private wildlife refuge is



severely affected by hunters and the regulations of this Council, membership on which is statutorily barred to him.

The Defendant New Jersey Fish and Game Council is a statutory body charged with the power to promulgate regulations governing hunting and fishing. In addition, Councilmen themselves have law enforcement powers, the right to appoint 130-150 deputy conservation officers who also have such powers, and the right to supervise the activities of full time conservation officers. Moreover, the Council's statutory powers over the civil-service staffed Division of Fish, Game and Shellfisheries, including the power to report and hold public hearings concerning its activities and to select and fire its Director, gives it great power over state wildlife policy since the Division has broad responsibilities in this area. Further, the Council's power over public lands has recently increased since state fish and wildlife management lands are now purchased with general revenues rather than the proceeds from the sales of hunting and fishing licenses.

However, the composition of the Council has remained constant from 1945 when it was changed from a nine member body chosen on the basis of knowledge alone to an eleven member body, six of whom must be sportsmen nominated by the New Jersey Federation of Sportsmen's Clubs, three of whom must be farmers nominated by the State Agricultural Convention, and two of whom must be commercial fishermen.

The character of the nominating organizations, in combination with the qualifications for office, ensure that appellants will not only be excluded from Council membership but also that they will be deprived of any influence over the Council selection process. The appellee Federa-

tion, as the Court below conceded, is composed overwhelmingly of and led by hunters and fishermen, and has always chosen its own officials and members for the Council positions. 70 N.J. at 570, — A.2d — Appendix A at 7a. The appellee Agricultural Convention, a purely agrarian body, has functioned similarly in the interests of the farmers. Appellants who are neither sportsmen, fishermen, or farmers and who are therefore not affiliated with organized hunting or farming interests, have been and will continue to be left out. Further, the requirement that the Governor approve the nomination and the New Jersey Senate give its advice and consent thereto has proved to be no check on these organizations' power to initiate nominations since the Federation and Convention need only submit one name for consideration to fill each vacancy and, given this control over choice, no nominee of theirs has ever been rejected.

Appellants initiated this suit in February 1973 in order to gain access to the Council. They hoped to ensure that its policy judgments would reflect all interests touched by the Council's powers, not just the interests of hunters, fishermen and farmers. They were successful at the trial level. On June 12, 1974, the Superior Court of New Jersey, Chancery Division, held that the exclusion of knowledgeable conservationists from the Council was so arbitrary as to violate the minimum scrutiny test under the equal protection clause. Two months later, on August 14, the court issued an order enjoining the defendants from enforcing the restrictive provisions in the selection of knowledgeable persons for Fish and Game Council membership. This order was in effect for almost two years since the State defendants never applied for a stay pending appeal while the Federation's belated attempt to obtain a stay from the trial court was rejected and was never re-



newed in an appellate court. Thus, no appointments have been made since June, 1974, and ten of the eleven council members are currently serving as holdovers.

The defendants appealed to the Superior Court of New Jersey, Appellate Division. However, while the matter was pending in that Court, the Supreme Court of New Jersey, in October, 1975, granted plaintiffs motion, based on the public importance of the case, for direct certification without the usual intermediate appellate review. 69 N.J. 398, 354 A.2d 326 (1975).<sup>1</sup> On July 15, 1976, the New Jersey Supreme Court reversed in a 6-1 decision which sustained the validity of the statute. The Court held that the appointive scheme, while not perfect, satisfied the requirements of the equal protection clause since the grant of access of some groups and not others was rational given the relatively narrow scope of Council activities. The delegation of nominating powers to private groups was similarly sustained against appellants' due process attack. The dissenting opinion would have affirmed the judgment of the trial court on the ground that the distinctness of plaintiffs' interests in activities subject to the Council's jurisdiction made their exclusion unconstitutionally arbitrary and irrational. The instant appeal, filed September 29, 1976, followed this decision.

The federal constitutional issues in this case under the due process and equal protection clauses were raised initially in both counts of the complaint in the Chancery

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<sup>1</sup> Normally appeals are taken first to the Superior Court, Appellate Division, and only then to the Supreme Court of New Jersey which has the discretion to refuse to hear them. R. 2:12-2. The Supreme Court's power to review a case directly without Appellate Division review is exercised sparingly in cases of general public importance. N. J. Court. Rule 2:12-4.

Division of the Superior Court. They have been ruled on by the trial court which explicitly found a federal constitutional violation and the State Supreme Court which explicitly found no such infirmity.

## ARGUMENT

### The Questions Are Substantial.

#### 1. Introduction

This case comes within the clear language of 28 U.S.C. §1257(2) since it involves a federal constitutional challenge to a state statute, N.J.S.A. 13:1B-24, which challenge was rejected in a final order of a state court of last resort.

The questions in this case are of paramount public importance since they concern the superintendency of wildlife and public lands which have been held in trust for the benefit of the entire public throughout our country's history. *Geer v. Connecticut*, 191 U.S. 519 (1896); *Ill. Cent. R.R. v. Illinois*, 146 U.S. 387 (1892); *Arnold v. Mundy*, 6 N.J.L. 1, 71 (Sup. Ct. 1821). The Supreme Court of New Jersey recognized the importance of this case when it agreed to take it prior to review by New Jersey's intermediate appellate court. 69 N.J. 398, 354 A.2d 326 (1975). N.J. Court Rule 2:12-2. Further, the general issue as who shall manage the public trust property is nationwide. *See, e.g., Bayside Timber Co. v. Board of Supervisors*, 20 Cal. App. 3d 1, 97 Cal. Rptr. 431 (Ct. App. 1971) concerning private control over state forestry lands. Nor is the kind of wildlife management scheme challenged here entirely unique. Although New Jersey's situation is perhaps more extreme than that of any other state, several other jurisdictions do vest private



groups with substantial control over public wildlife resources.<sup>2</sup>

Another aspect of this case also marks it as a highly significant one. At issue here is no private grievance but the question of fitness for service in public office. This question has frequently confronted this Court in the context of appointive as well as elective offices. *E.g.*, *Turner v. Fouche*, 396 U.S. 346, 364 (1970); *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605 (1974). *Cf.* *Gibson v. Berryhill*, 411 U.S. 564 (1973); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972). Qualifications for office having thus been the subject of several opinions by this Court, a case raising such issues clearly comes within the substantiality strictures of *Zucht v. King*, 260 U.S. 174, 176, 177 (1922) insofar as its underlying subject matter is concerned.

## 2. Equal Protection

This case is also substantial on the merits. It lies squarely within the parameters of *Turner v. Fouche*, 396 U.S. 346 (1970) which held that a state could not restrict the opportunity to hold public office through eligibility requirements that broadly exclude qualified as well as unqualified persons. 396 U.S. at 364. In voiding the requirement that school board members had to be freeholders, the Court, while not questioning the tie between freeholders and educational interests, held that the state could not rationally presume that non-freeholders were "necessarily wanting" in the kind of attachment to the community which was desirable for school board members. *Id.*

<sup>2</sup> See *Ky. Rev. Stat.* 150.022; *Mass. Gen. L. Ann. Ch.* 13, §7; *Nev. Rev. Stat.* 501-171, 260 and 320; *N. Y. Environmental Conservation Law* (McKinney 1974) 11-0501 and 9-0705, 707, 709 and 711.

The question was framed in substantially similar terms by the trial court here which conceived the issue as the rationality of broadly excluding knowledgeable persons who did not happen to be sportsmen, farmers or commercial fishermen. *Humane Society of the United States, New Jersey Branch v. N.J. Fish and Game Council*, 129 N.J. Super. at 245-246, 322 A.2d 843-844, Appendix A at 35a. Compare *Turner v. Fouche*, *supra*. Under such a formulation of the issues, the strength of appellants' position becomes clear. However rational it may be to presume that hunters, farmers and commercial fishermen have an interest in wildlife regulation, it cannot be assumed that others are without such an interest. The trial court and the Supreme Court dissent, 70 N.J. at 580-586, —A.2d —, Appendix A at 19a to 27a, both adopted this view and would have voided the interest group qualifications as arbitrary and irrational.

The record simply contains no rational basis for the Legislature's having drawn a line of distinction which excludes appellants who are greatly affected by the operations of the Council. See, *Salter Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973). Appellees stipulated at trial that the Council has enormous powers to determine State policies affecting wildlife, and that its determinations affect wildlife ecology and the recreational and educational interests of appellants' membership. In this vein, appellees further agreed that the Council has great planning authority over the management of wildlife. With specific regard to appellant Ferber, they conceded that use of his land as a wildlife refuge is severely affected by the hunting regulations promulgated and enforced by the Council. Further, a study of the Division of Fish, Game and Shellfisheries which was commissioned in part by the appellee Council itself found that the responsibilities of the Division and the appellee



Council reflected a broad concern for wildlife which was not limited to hunting and fishing. Accordingly the study recommended that the name of the Fish and Game Council be changed to Fish and Wildlife Council to accurately reflect these broader interests, which, it must be stated, are precisely the appellants' interests. Of crucial importance is the study's further recommendation that personal involvement in fishing or hunting not be a paramount consideration for Council membership since persons with strong business or administrative experience could contribute as much to the work that the Council actually does. Wildlife Management Institute, *Evaluation of the New Jersey Division of Fish, Game and Shellfisheries: A Report to the New Jersey Fish and Game Council and the Director, New Jersey Division of Fish, Game and Shellfisheries*, 18-19 (April 1975) (hereinafter *Evaluation*).

The Council's statutory powers are in truth as broad as the stipulation and *Evaluation* assert them to be. The Council's powers over enforcement of its fish and game regulations against sportsmen and fishermen,<sup>3</sup> over other

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<sup>3</sup> Under N.J.S.A. 23:2-2, *et seq.*, the Council is not only generally charged with enforcement of fish and game laws, but it is also given remarkable specific powers to that end. Thus, the Council may permit persons to carry firearms in the woods "when necessary for the conservation of wildlife." N.J.S.A. 23:2-2. It may investigate any complaint made to it and, on view or information, arrest and prosecute any suspected offender without complaint or warrant. *Id.* Councilmen themselves and unpaid deputy game wardens whom the Council appoints have the power of summary arrest in cases of flagrant violation of the fish and game laws. In making such an arrest they have the right to call upon any constable, sheriff, or other peace officer; such officer is liable for a civil penalty if he or she fails to respond. N.J.S.A. 23:2-8, 10, 11. Even the fish and game wardens, who are the principal wildlife law

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activities of the Division of Fish, Game and Shellfisheries and over wildlife planning and management<sup>4</sup> clearly trench

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enforcement force and who are not appointed by the Council, N.J.S.A. 23:2-4, are substantially subject to the Control of the Council. Under N.J.S.A. 23:2-7 the Council, with the Governor's approval, decides whether and how the wardens shall be armed. N.J.S.A. 23:2-6 requires each warden to make a monthly report to the Council. The chief warden who is called the fish and game protector must (a) report any non-feasance or malfeasance by the wardens, (b) report generally to the Council on the operation of his department, and (c) render to the Council any report it requires.

The unusual law enforcement system just described makes the privately nominated councilmen law enforcement officers themselves, gives them the power to appoint an indefinite number of deputies, amounting to a legally sanctioned quasi-private police force, and places the publicly appointed law enforcement officers under the Council's thumb. As a result, the Council which is dominated by the officers of the Federation, a sportsmen's group, has the power to influence the enforcement against sportsmen of public laws and regulations, including not only prohibitions relating to the taking of game animals, but also prohibitions relating to the taking of non-game species, N.J.S.A. 23:2A-6, 23:4-50, against trespass by hunters, N.J.S.A. 23:7-1, and gunning while under the influence of alcohol, N.J.S.A. 23:4-36, all of which are of paramount interest to the non-sportsman public.

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<sup>4</sup> Subject to the approval of the Commissioner of Environmental Protection, the Council "Shall . . . formulate comprehensive policies for the protection and propagation of fish, birds and game animals and for the propagation and distribution of food and fish and the keeping up of the supply thereof in the waters of this State." N.J.S.A. 13:1B-28.

For the purposes of this case two things are noteworthy about this planning authority. First, although it is limited to game

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upon the interests of non-sportsmen conservationists. For example, under N.J.S.A. 13:1B-27, previously mentioned, the Council hires the Director of the Division subject to the Governor's approval.

The Director, who is entrusted with the immediate supervision of the Division, by N.J.S.A. 13:1B-27, serves at the pleasure of the Council. He must, as a practical matter therefore, be responsive to the Council's wishes, not only with regard to the Fish and Game Code but with regard to any of the many wildlife matters with which the Division deals. Similarly, he must ensure that the civil servants under his direction stay on good terms with the Council members.

In addition to its control over the Director's job, the Council has other powers which, like its power to fire the Director, enable it to effect not only the fishing and hunting work of the Division, but also the entire scope of Division activities. Thus, under N.J.S.A. 13:1B-28(a) the Council is empowered to consult with and advise the Director and Commissioner of Environmental Protection with respect to the work of the Division. Paragraphs (b) and (c) of the same section empower the Council to hold

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*(Footnote continued from preceding page)*

animals, its coverage of fish and birds is absolute. In fact, the specific reference to "food fish" in the final portion of the first sentence of 13:1B-28 makes it clear that the earlier unmodified references to "fish" and "birds" are general in scope. Second, the policies to be formulated by the Council regarding wildlife must be "comprehensive." This means at least that the Council's plans should cover the protection of the habitat, some of which is on the public lands and waters, use of such land by the public in a manner consistent with the Council's view of sound wildlife policy, and the relationship between game and non-game species, all of which belong to the public trust in wildlife.

hearings concerning the activities of the Division and to report to the Governor and Legislature any findings and conclusions it may reach concerning such activities. These powers of consultation, investigation and report are not limited to hunting and fishing, and the Council is free to use them to influence any of the activities undertaken by the Division.

Since the range of Division activities is far broader than hunting and fishing, the Council's influence over the Director and his staff has a wide scope in terms of subject area. As the recent Evaluation of the Division by the Wildlife Management Institute found, increasingly the Division is being involved more and more in "work of general service nature to the public," especially with regard to coastal zone management which is the subject of a great deal of recent state and federal legislation. *Evaluation* at 25, 32, 42.

Finally, the jurisdiction of the Council over public parklands is extensive, despite what was written below. 70 N.J. at 576-577 — A.2d —, Appendix A at 15a. In fact, as appellants pointed out in their brief below, some 130,000 acres of public land open to hunting each year is solely under the control of the Council-appointed Director of the Division of Fish, Game and Shellfisheries.<sup>5</sup>

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<sup>5</sup> In recent years, the practice has been to acquire these Fish and Wildlife Management areas, which now total some 130,000 acres, with general bond revenues rather than dedicated license funds. Some 40,000 acres have been acquired in this fashion. *Evaluation, supra*, at 32. There are also about 200,000 additional acres of state land open to hunting which are not under the sole control of fish and game personnel. The court below appeared to confuse these lands with the 130,000 acres of Fish and Game Management Areas when it discussed joint control over public land. 70 N.J. at 576-577, — A.2d — at Appendix A at 15a.



Quite clearly the Council's powers are not narrow. The uncontradicted evidence presented *supra* demonstrates that its powers over wildlife and public lands are broad, and that only its membership base is indeed narrow. The irrationality of appellants' exclusion from office is thus manifest.

Another, and self-admittedly less important reason for the Court's sustaining the statute below was its belief that it did not absolutely bar plaintiffs from selecting members of the Council even if it did actually bar membership by them. 70 N.J. at 575, — A.2d —, Appendix A at 13a. While the Court agreed *arguendo* that the term "sportsmen" in the statute meant only hunters or fishermen rather than conservationists like appellants,<sup>6</sup> it stated nonetheless that plaintiffs could at least influence the selection process by affiliating themselves with the Sportsmen's Federation which such chooses six sportsmen in the narrower sense as Council nominees. This assertion is unsupported by the record given the Court's findings that all Sportsmen Federation and Agricultural Convention nominees have been members of these organizations, and that the Federation consists almost entirely of hunters or fishermen and the Convention entirely of agriculturalists, 70 N.J. at 570, — A.2d —, Appendix A at 7a. It must be inferred, therefore, that plaintiffs, non-hunters and fishermen, would have very little influence over the Federation's membership even if they could join it. The picture of Sierra Club or Humane

<sup>6</sup> The Court's statement that no party seemed sure that this meaning was in fact the case is wrong. Appellants' brief below cited N.J.S.A. 13:18-4 which uses the terms "conservationist" and "sportsmen" distinctly to show that the "sportsman" in the statute at issue here must be narrowly construed; appellants repeated this view at oral argument.

Society members joining a sportsmen's organization to vote for the hunter of their choice is thus pure fiction.

Further, the Federation does not represent the appellants' views and philosophy, according to common sense as well as an explicit stipulation entered into below and cited by the dissent. Thus, appellants' lack of influence in the Federation translates into a lack of representation for appellants' views on the Council. See 70 N.J. at 583-584, — A.2d —, Appendix A at 23a-24a. (Pashman, J., dissenting). It is obvious that the goals of the Humane Society, for example, cannot realistically be represented by hunter's federation when the task of that federation is to choose six sportsmen, *i.e.*, hunters or fishermen, to manage New Jersey's wildlife.

In concluding this equal protection argument, appellants would point to one last circumstance which demonstrates the utter arbitrariness of this statute.

The Court below went to considerable torturous lengths in justifying the inclusion on the Council of two commercial fishermen. Since the activities of this tiny group of persons are essentially not subject to the jurisdiction of the Council, 70 N.J. at 574, — A.2d —, Appendix A at 23a<sup>7</sup>, the Court opined that the familiarity of such people with fishing generally might give them insight into fresh water fishing which the Council does regulate. Yet how much more insight into the variegated activities of

<sup>7</sup> There is no commercial fresh water fishing in New Jersey and only about 500 people earn their living as salt water commercial fishermen.



the Council is possessed by the far more numerous classes of people like plaintiffs and their members, who are conservationists with a real concern for wildlife ecology. Under what standard of statutory rationality, to use the language of *Turner v. Fouche*, can salt water commercial fishermen be presumed to have such peculiar knowledge of land animals and fresh water fish as to justify including them on the Council while automatically excluding plaintiffs, whose knowledge of wildlife ecology has been stipulated by the defendants, but who happen not to hunt, fish or farm. The categories established by N.J.S.A. 13:1B-24 are utterly arbitrary and irrational. The substantiality of appellants' equal protection argument is therefore manifest.

### 3. Public Trust

New Jersey recognizes that wildlife and public lands are the property of no single person or group but are held in trust for the benefit of all its citizens. *Neptune City v. Borough of Avon-by-the-Sea*, 61 N.J. 296, 294 A.2d 47 (1972); *Arnold v. Mundy*, 6 N.J.L. 1, 71 (Sup. Ct. 1821). The court below, while agreeing that the Council regulated public trust property, found no breach of trust here since there was no allegation or proof of self-motivated action. 70 N.J. at 579, — A. 2d at —, Appendix A at 18a. However, plaintiffs raised the public trust concept, both here and below, not strictly with self-interest in mind, but in order to emphasize that property which belongs to all the citizens ought to be governed by a reasonable cross sections of the citizenry. The equal protection violation alleged by appellants is intensified where the subject matter they are excluding from regulating—wildlife and public lands—belongs as much to them as to

the favored groups. Again referring to *Turner v. Fouche*, how can it be rational to presume conservationist plaintiffs as a class are unfit to exercise control over something that belongs to them as citizens. This presumption, like the freeholder qualification in *Turner*, sweeps too broadly and should be replaced by a legislative line more appropriate to governance of the common property in wildlife and public lands.

### 4. Due Process

Plaintiffs as active users of the public trust urged below that the Sportsmen's Federation's right to nominate a majority of the Council constituted an impermissible delegation of the right to control public trust property. They asserted that the state cannot on the one hand declare wildlife to belong in common to all the people, *Arnold v. Mundy*, *supra*, and on the other hand vest control over that property in a single private group, the Sportsmen's Federation. Such a curtailment of public property rights violates due process of law.

This Court has not dealt with infringement of public property rights by an unrepresentative management arrangement. Compare *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1935). However, this Court has repeatedly held that it will safeguard from infringement those property interests which have been created by state law. *E.g.*, *Bishop v. Wood*, 96 S. Ct. 2074 (1976). New Jersey has clearly endowed the public with rights in those parts of the public trust corpus—wildlife and lands—regulated by the Council. *Neptune City v. Borough of Avon-by-the-Sea*, 61 N.J. 296, 294 A.2d 47 (1972); *State v. Jersey Central Power and Light Co.*, 133 N.J. Super. 375, 392, 336 A.2d 750, 758-759 (App. Div. 1975), *rev'd on other grounds*



69 N.J. 102, 351 A.2d 337 (1976). The question here is whether the state can arbitrarily give control over those property rights to a single organization, the Federation, whose interest in those rights is narrowly defined.

When faced with a delegation argument grounded on state created rights in public rather than private property, at least one state court has responded by voiding a statute that vested control over public forest lands in unrepresentative private organizations. Analogizing their situation to that of the coal operators in *Carter v. Carter Coal Co.*, *supra*, who questioned private control over their economic activities, the Court in *Bayside Timber Co. v. Board of Supervisors of San Mateo County*, 20 Cal. App. 3d 1, 97 Cal. Rptr. 431, 439 (Ct. App. 1971), held that conservationists who had no pecuniary stake therein could challenge on due process grounds a delegation to private timber interests of forestry management authority over public lands. The state, having established a public interest in these lands, had to give the public some voice in their management. The due process property rights asserted by the appellants in the instant case are equally as rooted in state law. *Bishop v. Wood*, *supra*, therefore protects these rights against arbitrary infringement.

The New Jersey Supreme Court's rejection of appellants' due process contention would allow their interest in the public trust to be vitiated. The court held that rights in the public trust were not violated because there was no potential for self aggrandizement on the part of councilmen given the narrow scope of council authority. 70 N.J. at 579, — A.2d —, Appendix A at 18a. Appellants have dealt some length with the scope of authority issue above and these arguments need not be repeated here. Suffice to say here that the Federation, through its domination of the Council does obtain

a substantial degree of control over the public trust property. Further it can use that control on behalf of interests which have been stipulated to be quite different from those of the appellants who have no access to control over property the state has declared to belong to all citizens in common. 70 N.J. at 583-584, — A.2d —, Appendix A at 23a (Pashman, J., dissenting).

Thus, contrary to the ruling below, the delegation here does leave the use of broad property rights to a single private group with a particular set of interests. A decision by this Court can resolve the substantial due process issue of the extent to which the state may give control over public rights to unrepresentative private interests. As a result, this case presents both due process and equal protection issues of sufficient weight to warrant exercise by this court of its obligatory appellate jurisdiction. Sustaining of the decision below given the record in this case would sound the death knell for the rights of ordinary citizens in the governance of property—wildlife and state lands—to which these citizens thought they were entitled.

Respectfully submitted,

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On the Statement

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## **APPENDIX A**

### **Opinion of the Supreme Court of New Jersey (70 N. J 565, 1976)**

The Human Society of the United States, New Jersey Branch, Inc., a non-profit corporation of the State of New Jersey; the Sierra Club, Inc., a California non-profit corporation; Hermina C. M. Andrews and Fred Ferber, citizens and taxpayers of the State of New Jersey, Plaintiffs-Respondents v. New Jersey State Fish and Game Council, an agency of the State of New Jersey; William T. Cahill, Governor of the State of New Jersey; the Senate of the State of New Jersey, and Alfred N. Beadleston, President thereof; the New Jersey State Federation of Sportsmen's Clubs, a non-profit association of the State of New Jersey, and Robert Smalley, President thereof; and the State of New Jersey, acting through the Agricultural Convention of the State of New Jersey, a public body organized under the Revised Statutes of New Jersey, Defendants-Appellants.

Argued April 27, 1976—Decided July 15, 1976.

#### **SYNOPSIS**

Environmental organizations and individuals brought an action challenging, on equal protection and due process grounds, the constitutionality of a statute which sets forth the qualifications and recommendation procedures for appointment to the New Jersey Fish and Game Council. The Superior Court, Chancery Division, 129 N. J. Super. 239, held the statute unconstitutional, and certification was granted. The Supreme Court, Clifford, J., held that ex-



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clusion of persons other than sportsmen, farmers and commercial fishermen from membership on the Council was not of sufficient import to offend the Fourteenth Amendment, and that the role played by agricultural and sportsmen's interests in recommending nine of the 11 appointees to the Council did not amount to such an "inbred nominating process" as would offend due process because it produced a council incompletely representative of the public interest.

Reversed.

Pashman, J., dissented and filed opinion.

### 1. Consitutional law

In action by environmentalist groups and individuals challenging, on equal protection and due process grounds, constitutionality of New Jersey statute setting forth qualifications and recommendations procedures for appointment to New Jersey Fish and Game Council, trial court properly applied minimum scrutiny, rational basis test, which looked to whether state of facts existed that could reasonably justify legislative scheme; burden was therefore on plaintiffs to demonstrate that impact upon them of Fish and Game Council's decisions was so significant and substantial as to render statutory scheme which effectively barred them from appointment to Council patently arbitrary and unreasonable. N. J. S. A. 13:1B-24; U. S. C. A. Const. Amend. 14.

### 2. Officers

Legislature may prescribe such qualifications as reasonably relate to demands of specialized office.

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### 3. Fish

#### Game

There was reasonable basis for statutory inclusion of sportsmen, farmers and commercial fishermen in group of persons qualified for appointment to New Jersey Fish and Game Council. N. J. S. A. 13:1B-24, 23:3-41, 47, 23:4-63.3.

### 4. Constitutional law

#### Fish

#### Game

Equal protection of law was not denied environmentalist organization or individuals who were not farmers, sportsmen or commercial fishermen by statutory requirement that appointments to New Jersey Fish and Game Council be made only from persons in three latter categories. N. J. S. A. 13:1B-15.100 et seq., 15.104, 15.119 et seq., 15.120, 15.122, 15.123, 24, 25, 30 et seq., 35; 23:2A-1 et seq., 23:3-32, 41, 47, 23:4-1, 2, 18, 39, 43, 49, 58.1, 63.3, 23:5-1, 23:7-1, 45:9-1; U. S. C. A. Const. Amend. 14.

### 5. Constitutional law

Legislature's delegation of nominating authority to private persons is not in derogation of constitution where that document is silent as to appointment of public officials; even delegation of legislative authority to private parties may withstand constitutional challenge if sufficient safeguards exist to prevent arbitrary concentration of power in persons or groups motivated by self-interest; test is whether the particular delegation is reasonable under circumstances, considering purpose and aim of statute.



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## 6. Constitutional law

## Fish

## Game

New Jersey statute providing for manner of appointment of members of Fish and Game Council did not violate due process or work undue delegation of Legislature's powers of appointment to private organization by virtue of fact that it gave agricultural and the sportsmen's organizations role in recommending nine of 11 appointees to such Council. N. J. S. A. 13:1B-15.119 et seq., 15.120, 15.122, 15.123, 24.

*Mr. Jay D. Fischer* argued the cause for appellant N. J. State Federation of Sportsmen's Clubs (*Mr. Fischer* and *Mr. Leo J. Barrett*, attorneys).

*Mr. Stephen Skillman*, Assistant Attorney General, argued the cause for appellants N. J. Fish & Game Council, William T. Cahill, Governor of the State of New Jersey, the Senate of the State of New Jersey, Alfred N. Beadleston, and the State of New Jersey acting through the Agricultural Convention of the State of New Jersey (*Mr. William F. Hyland*, Attorney General of New Jersey, attorney; *Mr. Skillman* of counsel; *Mr. John M. Van Dalen*, Deputy Attorney General, on the brief).

*Mr. Peter A. Buchsbaum*, Assistant Deputy Public Advocate, argued the cause for respondents (*Mr. Stanley C. Van Ness*, Public Advocate, attorney).

*Mr. Steven E. Pollan* submitted a brief on behalf of *amicus curiae* Common Cause (*Messrs. Pollan and Pollan*, attorneys).

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*Mr. Edward J. Insley* submitted a brief on behalf of *amicus curiae* N. J. Council of Churches.

The opinion of the Court was delivered by

CLIFFORD, J. This case presents a challenge, on equal protection and due process grounds, to the constitutionality of N. J. S. A. 13:1B-24. That enactment sets forth the qualifications and recommendation procedures for appointment to the Fish and Game Council, an appointive eleven member body within the Division of Fish, Game and Shell Fisheries of the Department of Environmental Protection. The trial court (which heard the case on what it called "a limited stipulation of facts and legal argument"), in a formal opinion later clarified by a supplemental letter to counsel and subsequent order, held the statute unconstitutional, 129 N. J. Super. 239 (Ch. Div. 1974). While defendant's appeal was pending in the Appellate Division, this Court granted certification directly to the Chancery Division, 69 N. J. 398 (1975). We conclude the statute survives the constitutional attack made here and therefore we reverse.

## I

The Fish and Game Council is invested with certain regulatory powers aimed at protecting and developing an adequate supply of fish and game for recreational and commercial purposes. These powers are expressed primarily by the Council's determinations as to when and where in the state hunting and fishing shall take place, and which fresh water fish, game birds, game animals, and fur bearing animals may be taken and in what numbers. The wildlife thus regulated are those animals which are the focus of the sports of hunting and fishing.<sup>1</sup>

<sup>1</sup> Endangered species are separately regulated by statute, see N. J. S. A. 23:2A-1 et seq. and do not come within the scope of the Council's power and duties.



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In addition, the Council supervises a program of wildlife propagation, the expenses of which are supported by fees for hunting and fishing licenses paid for by sportsmen and commercial fishermen.

Plaintiffs are two non-profit organizations, the Humane Society, New Jersey Branch, and the Sierra Club, and two individuals who are taxpayers and citizens of New Jersey. They contend that the Fish and Game Council membership statute is constitutionally defective because it enumerates three classes of appointees to the Council—sportsmen, farmers, and commercial fishermen—and excludes from appointment any person who is not recommended to the Governor by either the State Agricultural Convention or the New Jersey State Federation of Sportsmen's Clubs (hereafter Sportsmen's Federation).

The statutory provisions for membership and appointment are as follows:

13:1B-24. Fish and Game Council; members; terms.

There shall be within the Division of Fish and Game, a Fish and Game Council which shall consist of eleven members, each of whom shall be chosen with due regard to his knowledge of and interest in the conservation of fish and game. Each member of the council shall be appointed by the Governor, with the advice and consent of the Senate. Three of such members shall be farmers, recommended to the Governor for appointment to the council by the agricultural convention held pursuant to the provisions of article two of chapter one of Title 4 of the Revised Statutes; six of such members shall be sportsmen, recommended to the Governor for appointment to the council by the New Jersey State

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Federation of Sportsmen's Clubs; and two of such members shall be commercial fishermen.

It is stipulated that the individual plaintiffs, the members of the Humane Society, New Jersey Branch, and the Sierra Club are all interested in and knowledgeable about the conservation of fish and game. As the statute indicates, although sponsorship by the Sportsmen's Federation and the State Agricultural Convention is essential to appointment to the Fish and Game Council, membership in those organizations is not. Plaintiffs enjoy the state's lands and wildlife for purposes other than hunting, fishing, and farming. For personal and policy reasons they cannot or will not become affiliated with or seek membership in the Sportsmen's Federation, nor do they at all suggest that they qualify, by occupation or otherwise, as farmers.<sup>2</sup> Plaintiffs contend, moreover, that any such

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<sup>2</sup> Although neither side contends that the term "sportsman" per se excludes environmentalists from its scope, plaintiffs point out that of fifteen Sportsmen's Federation officers or former officers responding to interrogatories, only one did not engage in hunting or fishing activities. Of 316 member clubs listed in response to interrogatories, 212 were named Rod and Gun Club or Trap Shooting Club. Only five of the listed clubs had titles suggesting purposes unrelated to hunting and fishing. One response by the Federation states that many member clubs include campers, hikers, and backpackers in their numbers but that no records are kept with reference to these non-hunting and fishing activities.

The State Agricultural Convention, held pursuant to statute, N. J. S. A. 4:1-5, is an annual meeting of delegates from county agricultural boards and private agricultural groups. Its membership elects by majority vote three farmers for recommendation to the Fish and Game Council. As such, the Agricultural Convention would not be the appropriate means for plaintiffs to seek access to the Council.



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affiliation would not serve to give them an effective voice in making or becoming the subject of recommendations to the Governor. In fact, the State conceded at oral argument that as a practical matter all appointees to the Council have been members of either the Sportmen's Federation or the Agricultural Convention.

The essence of plaintiffs' challenge is that they are practically barred from participating in the Fish and Game Council's decisions which affect plaintiffs' recreational and educational activities. They characterize their exclusion from the ranks of those eligible for appointment as a denial of equal protection. Additionally, they contend that the statutory delegation of the power of appointment to a private organization such as the Sportsmen's Federation violates due process. The trial court's opinion upheld plaintiffs' position and ruled that a person otherwise qualified may not statutorily be excluded from appointment to the Fish and Game Council on the grounds that he or she is not either a sportsman, a farmer, or a commercial fisherman. 129 N. J. Super. at 246. By the order following this formal opinion and supplemental letter, referred to above, the trial judge also declared unconstitutional those provisions of N. J. S. A. 13:1B-24 which channel appointments to the Council through the Sportsmen's Federation and the Agricultural Convention. Finally, he enjoined defendants from acting pursuant to the membership statute, with the result that the terms of five of the eleven Council members have expired and are being filled by "holdover appointees.

## II

It must be stressed here that plaintiffs have not alleged malefaction on the part of the Council members, past or

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present, nor has the inherent subject of their activities—namely, hunting and fishing in their recreational and commercial aspects—come under attack. Nor do plaintiffs condemn the qualifications the statute articulates for appointment to the Council, for they agree Council members should be chosen "with due regard to [their] knowledge of and interest in the conservation of fish and game." What rankles is the selection process, which operates so that the individual plaintiffs and the members of the organizational plaintiffs, all of whom possess the statutory qualifications for appointment, are excluded.

[1] The trial court correctly applied to the Council membership statute the minimum scrutiny, rational basis test, which looks to whether a state of facts exists that can reasonably justify the legislative scheme. *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U. S. 719, 93 S. Ct. 1224, 35 L. Ed. 2d 659 (1973). There the Supreme Court rejected an equal protection challenge directed against provisions in the California Water Code which established voter qualifications for electing the directors of water storage districts in the state. Only landowners were eligible to vote, and the votes were apportioned according to the assessed valuation of the land. The classification was found acceptable despite the fact that it impinged on the franchise, because landowners as a class bore the entire burden of the costs of the water district and California "could rationally conclude that they, to the exclusion of residents, should be charged with responsibility for [the district's] operation." 410 U. S. at 731, 93 S. Ct. 1231, 35 L. Ed. 2d at 668.

Here, as in *Salyer*, a particularized unit of government is implicated and the persons who achieve office do not have plenary powers. The Fish and Game Council is a



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specialized body, with statutorily prescribed duties and statutory limits on its powers and activities. Its members serve by appointment, not by election. Access to the Council cannot be said to be entwined with the fundamental right to vote, which would call for this Court to use the stricter, close scrutiny standard of review and would rebut the presumption of validity the statute now enjoys. *Bullock v. Carter*, 405 U. S. 134, 92 S. Ct. 849, 31 L. Ed. 2d 92 (1972); *Kramer v. Union Free School District*, 395 U. S. 621, 89 S. Ct. 1886, 23 L. Ed. 2d 583 (1969).

The burden, then, is on plaintiffs to demonstrate that the impact upon them of the Fish and Game Council's decisions is so significant and substantial as to render a statutory scheme which effectively bars them from appointment to the Council patently arbitrary and unreasonable. Only upon such a showing can their non-membership in this specialized body assume the dimensions of a constitutional deprivation.

## III

It is axiomatic that the Fourteenth Amendment does not forbid classifications per se.

Equal protection does not require that all persons be dealt with identically. If there is some reasonable basis for the recognition of separate classes, and the disparate treatment of the classes has a rational relation to the object sought to be achieved by the lawmakers, the constitution is not offended. [*N. J. State Bd. of Planners*, 48 N. J. 581, 601, appeal dismissed, 389 U. S. 8, 88 S. Ct. 70, 19 L. Ed. 2d 8 (1967).]

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[2, 3] The Legislature may prescribe such qualifications as reasonably relate to the demands of a specialized office. See *Alongi v. Schatzman*, 57 N. J. 564, 577-78 (1971); cf. *Wurtzel v. Falsey*, 69 N. J. 401 (1976). Logic is not offended by the classes included in the challenged statute. We have already stressed the discrete character of the Fish and Game Council, charged as it is with certain responsibilities and powers pertinent to ensuring the statutory objective of an abundant supply of game for recreational and commercial hunting and fishing. Sportsmen, farmers, and commercial fishermen feel directly the impact of decision-making in this area and are likely to have the necessary expertise to make the required decisions competently.

The statute specifies that six of the eleven Council members must be sportsmen. Assuming this category consists of the hunters and fishermen of the state, it is difficult to conceive of a group with a keener interest in maintaining a plentiful supply of game, in developing regulations to insure safety in hunting, and in overseeing the operations of the state's hatching and game farm and its stocking activities. Farmers, who are represented by three Council members, own the major part of the hunting lands in the State. Thus, as property owners, they are directly affected by the Council's activities. They are also in an advantageous position to recognize the point at which overpopulation in a species of game animal has become a matter of concern. The Council's power to regulate animals which menace agricultural crops, see N. J. S. A. 23:4-63.3, further justifies representation by farmers. To the extent that sportsmen and farmers have special interests which may at times conflict, the presence of both groups on the Council is at once a rational legislative decision and a de-



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sirable one. For the reason it is appropriate that these Council members be recommended to the Governor by organizations consisting of their peers.

Two commercial fishermen are appointed to the Council directly by the Governor, and their method of selection cannot be said to offend the due process principles plaintiffs advance. Regarding this classification, however, plaintiffs point out that inasmuch as the Council has jurisdiction over fresh water fishing and there is little commercial fresh water fishing in New Jersey, commercial fishermen therefore have only a tenuous connection with the purposes of the statutory scheme. That appointment is specified from this group rather than from the general public, however, is not necessarily arbitrary and capricious: the Council issues licenses to fishermen who wish to fish commercially in those waters or the Atlantic Ocean that are within the state's jurisdiction, see N. J. S. A. 23:3-31 and N. J. S. A. 23:3-47. Additionally, it is logical to assume that commercial fishermen have, by virtue of their trade, an overall expertise that commends their membership on the Fish and Game Council. The fact that the Council's minimal control of salt-water fishing has no significant commercial impact obviates any suggestion that the two commercial fishermen who serve on it could use their office to promote directly their own or the industry's economic well-being over the public interest.

## IV

[4] Having determined that there is a reasonable basis for the statutory inclusion of sportsmen, farmers, and commercial fishermen, and giving all due regard to plaintiffs' articulated concerns, we cannot find that plaintiffs' exclu-

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sion is of sufficient import to offend the Fourteenth Amendment. While neither side evinced any certainty at oral argument that the term "sportsman" does not include an environmentalist, nevertheless even if we assume that the classification contemplates only hunters and fishermen, the statutory scheme is not unduly stringent. The legislative arrangement suggests that the numbers of sportsmen for purposes of the appointment process should be substantial, inasmuch as eligibility for membership in the Sportsmen's Federation is provided to every duly organized sportsmen's club in the state with twenty-five or more members specifically for the purpose of permitting "the broadest possible representation of sportsmen in the making of recommendations for appointment of sportsmen to membership in the council . . ." N. J. S. A. 13:1B-25.

Plaintiffs have elected not to align themselves with the Sportsmen's Federation, a choice that assuredly is theirs to make. However, they have neither alleged nor proven that their interests are antithetical to the Federation or that, should they attempt to join, they would be rejected.<sup>3</sup> It is perfectly reasonable, therefore, to view their continued absence from the Council as a product of plaintiff's own alienation rather than as the result of a statutory exclusion.

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<sup>3</sup> N. J. S. A. 13:1B-25 provides for a review by the State Federation of any refusal by a county federation to accept for membership an eligible sportsmen's club. According to the Federation's constitution, "Any citizen of good character residing in the State of New Jersey at the time of application shall be eligible to hold Associate Membership upon compliance with the provisions of the Constitution and By-Laws."



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More compelling, however, is the fact that the dominion of the Fish and Game Council is so confined. The wildlife it regulates, as indicated, are limited specifically to those species which are commonly the subjects of hunting and fishing, and even then the regulatory power is restricted. See, *e. g.*, N. J. S. A. 23:4-49, defining game birds to include twenty-two species; N. J. S. A. 23:4-1, prohibiting hunting of most of these birds except in open season fixed by federal regulation. See also N. J. S. A. 23:4-18. The hunting season and, where applicable, the bag limits for certain birds and small game, N. J. S. A. 23:4-1, N. J. S. A. 23:4-2, and N. J. S. A. 23:3-32, certain fur-bearing animals, N. J. S. A. 23:4-39, deer, N. J. S. A. 23:4-43, foxes, N. J. S. A. 23:4-58.1, and certain fish, N. J. S. A. 23:5-1, are set forth by statute where no provision in these instances otherwise appears in the State Fish and Game Code. The Council is responsible for issuing the regulations which comprise the Code, N. J. S. A. 13:1B-30. While it enjoys, in the discharge of this function, a certain flexibility permitting enlargement or limitation of the statutory designations, nevertheless the Council at all times must condition such departures on the essential purpose its regulations are designed to serve—the maintenance of a plentiful supply of game and fish for recreational hunting and fishing. Notice and public hearings as well as scientific investigation and research must precede adoption of and any changes in Code regulations and amendments thereto. N. J. S. A. 12:1B-31 *et seq.* The statutory scheme expressly subjects “[a]ny regulation, or amendment thereto, or repealer thereof” to appropriate judicial review. N. J. S. A. 13:1B-35.

The Council does not have unfettered authority to decide that hunting or fishing will take place on private property,

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see N. J. S. A. 23:7-1, or on state-owned lands. As to the latter, co-existing with the Division of Fish, Game and Shell Fisheries in the Department of Environmental Protection is the Division of Parks, Forestry and Recreation, N. J. S. A. 13:1B-15.100 *et seq.*, which has its own Council. This likewise is made up of eleven members, who recommend programs and policies concerning the acquisition, development, use and improvement of state parks, forests, and recreation areas. N. J. S. A. 13:1B-15.104. The competitive interests of the respective Councils are served by the legislative scheme, and it is fair to say that the interests of plaintiffs in enjoying the state's lands and wildlife for purposes other than hunting and fishing are represented in part by the Parks, Forestry and Recreation Council.

In summary, what authority the Fish and Game Council has been given by N. J. S. A. 13:1B-30, empowering that body to determine “under what circumstances, when and in what localities, by what means and in what amounts and numbers” fish and game may be taken, must be said to be circumscribed by other agencies, see n. 5 *infra*, and existing statutory norms. That authority is limited as well as by the mandate that the Council direct its regulations toward providing “an adequate and flexible system of protection, propagation, increase, control and conservation” of fish and game birds and animals. The consignment of the specialized powers and duties flowing from this legislative scheme to so-called special interest groups has a rational basis,<sup>4</sup> because these entities are most directly affected by

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<sup>4</sup> This concept is not unique. The professional boards provided for by Title 45 of the Revised Statutes almost uniformly have a

(Footnote continued on following page)



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the Council's regulations and possess the requisite expertise for achievement of the statutory objective.

Furthermore, the statute passes muster even were we to go beyond the traditional rational basis test and apply the means focused test, which this Court has used to determine constitutional challenges asserting interests more fundamental than the ones advanced by these plaintiffs. See *Bor. of Collingswood v. Ringgold*, 66 N. J. 350 (1975), appeal dismissed, — U. S. —, 96 S. Ct. 2220, —, 48 L. Ed. 2d 826, 44 U. S. L. W. 3684 (1976); Gunther, "The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection," 86 *Harv. L. Rev.* 1, 22-24 (1972). The governmental interest in establishing regulations to ensure a plentiful supply of game animals for consumption and sport is suitably furthered by placing a degree of regulatory control in the hands of a Fish and Game Council composed of sportsmen, farmers, and commercial fishermen. Opening the Council's membership to persons with differing philosophies might reflect the art of public relations, but it is not a constitutional necessity.

## V

Finally, plaintiffs contend that the role played by the Agricultural Convention and the Sportsmen's Federation in recommending nine of the eleven appointees amounts to

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(Footnote continued from preceding page)

majority membership made up of representatives of the regulated professions. See, e.g., N. J. S. A. 45:9-1 (doctors); N. J. S. A. 45:11-24 (nurses). Measured against this legislative scheme, which entrusts to interested parties rather than the general public the management of particular professions, the Fish and Game Council's membership statute is neither untoward nor surprising.

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"inbred nominating process" offensive to due process because it produces a Council incompletely representative of the public interest. See *Lanza v. Wagner*, 11 N. Y. 2d 317, 229 N. Y. S. 2d 580, 183 N. E. 2d 670 (Ct. App.), appeal dismissed and *cert. den.*, 371 U. S. 74 and 901, 83 S. Ct. 177 and 205, 9 L. Ed. 2d 163 and 164 (1962).<sup>5</sup>

[5] The delegation of nominating authority to private persons is not in derogation of the constitution where that document is silent as to the appointment of public officials. *Driscoll v. Sakin*, 121 N. J. L. 225 (Sup. Ct. 1938), *aff'd*, 122 N. J. L. 414 (E. & A. 1939). Even delegation of legislative authority to private parties may withstand constitutional challenge if sufficient safeguards exist to prevent an arbitrary concentration of power in persons or groups motivated by self interest. "The test is whether the particular delegation is reasonable under the circumstances

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<sup>5</sup> We note that an appointive scheme relating to a statutory body known as the New Jersey Natural Lands Trust, N. J. S. A. 13:1B-15.119 *et seq.*, bears striking similarity to the appointment methods plaintiffs find offensive in N. J. S. A. 13:1B-24. The Natural Lands Trust, which has trusteeship powers relating to natural areas preservation, N. J. S. A. 13:1B-15.122 and N. J. S. A. 13:1B-15.123, is composed of eleven members, six of whom are appointed by the Governor "from a list of candidates nominated by a nominating committee provided by a group of nonprofit New Jersey corporations having open space preservation or environmental education as their corporate purpose, \* \* \*." N. J. S. A. 13:1B-15.120. The five remaining trustees are *ex officio*. Plaintiffs, particularly the Sierra Club, Inc., have interests analogous if not identical to the corporate purposes defined in that statute. The same arrangement, therefore, that plaintiffs characterize as essentially a sword against their interests operates as a shield in this context. As this opinion undertakes to demonstrate, seen either way such an appointment process is constitutional.



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considering the purpose and aim of the statute." *Male v. Renda Contracting*, 64 N. J. 199, 201, *cert. den.*, 419 U. S. 839, 95 S. Ct. 69, 42 L. Ed. 2d 66 (1974).

[6] In *Male, supra*, a statute which fixed the wage rate for public works was geared to wages for particular crafts or trades fixed by collective bargaining agreements in the locality. We noted that the parties who negotiate these agreements were competing groups with opposing economic positions, so that the outcome of their negotiations reflected a balance of interests. While it was alleged in *Male* that the delegation created a danger of self-motivated action, no actual harm to the public good was shown. *Id.* Here it has not even been alleged.<sup>6</sup> Our review of the limitations on the Fish and Game Council's authority, which limitations serve to promote other interests, convinces us that there does not reside in that body the potential for such aggrandizement of the Council members' interests as would be repugnant to due process.

Finally, we record our recognition of the fact that the Council's operations bear on the public interest. That being so, the present composition of the Council may be perceived as less than ideal. While the cure does not lie in opening up Council membership to other public interest groups in addition to farmers, sportsmen and commercial fishermen, we acknowledge that a better balance would be achieved by the presence of some public members. Legislative action towards that end would be salutary.

<sup>6</sup> Had there been such an allegation, we might be obliged to consider an argument based on the public trust doctrine. See *Bor. of Neptune City v. Bor. of Avon-by-the-Sea*, 61 N. J. 296 (1972). As it is, the concept has no identifiable nexus with the legal issues under consideration.

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## VI

The judgment of the trial court is reversed. The injunction is dissolved, and appointments to fill the vacancies now held by holdover appointees may be made forthwith consistent with the existing legislative formula.

PASHMAN, J. (dissenting). The majority reverses a trial court determination in this case, and upholds the appointive membership scheme of the State Fish and Game Council against constitutional challenge. That scheme, which is statorily-prescribed by N. J. S. A. 13:1B-24 provides:

There shall be within the Division of Fish and Game, a Fish and Game Council which shall consist of eleven members, each of whom shall be chosen with due regard to his knowledge of and interest in the conservation of fish and game. Each member of the council shall be appointed by the Governor, with the advice and consent of the Senate. Three of such members shall be farmers, recommended to the Governor for appointment to the council by the agricultural convention held pursuant to the provisions of article two of chapter one of Title 4 of the Revised Statutes; six of such members shall be sportsmen, recommended to the Governor for appointment to the council by the New Jersey State Federation of Sportsmen's Clubs; and two of such members shall be commercial fishermen.

The 11-member panel which the statute creates draws its membership from three designated classes which have commercial and recreational interests in hunting and fishing. Accordingly, the statute allots six, three and two represen-



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tatives to "sportsmen," "farmers," and "commercial fishermen," respectively. The statute also delegates exclusive nominating authority for the first two groups to the New Jersey State Federation of Sportmen's Clubs (Sportsmen's Federation) and the State Agricultural Convention.

Plaintiffs represent organizations and individual citizens and taxpayers of New Jersey who are vitally concerned with conservation of the environment. In challenging the composition and selection of the Fish and Game Council, they derive standing from their interest in environmental conservation; this concern clearly falls within the statutory ambit of the Council and is directly affected by its decisions.

In pressing their claim, plaintiffs assert that the appointment scheme in N. J. S. A. 13:1B-24 does not acknowledge their distinct interests and totally excludes them from representation on the Council. In particular, they contend that the statutory delegation of exclusive nominating authority to the State Agricultural Convention and the Sportsmen's Federation creates an "inbred nominating process," whose practical operation limits Council nominations to members of the nominating groups. Plaintiffs do not challenge either the rights or the qualifications of the present membership of the Council. Nor do they contend that any of the 11 members who presently comprise the Council lack the requisite "knowledge of and interest in the conservation of fish and game." N. J. S. A. 13:1B-24. In addition, plaintiffs frankly concede that their objections to the statutory scheme would be obviated if they joined either of the designated organizations. Nonetheless, because of philosophical differences which distinguish

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their interests from those espoused by the Sportsmen's Federation and the State Agricultural Convention, plaintiffs have declined such affiliation. While they seek representation on the Council, plaintiffs do not question the rationality or legitimacy of appointing representatives of the designated groups to the Council. What they do challenge, however, is the arbitrariness inherent in a scheme which effectively limits appointments to representatives of those groups only to the exclusion of all other interested parties.<sup>1</sup> Because I find the discriminatory impact of this statutory scheme to be arbitrary and unreasonable and because I feel that plaintiffs deserve independent representation on the Council, I dissociate myself from the majority and would affirm the trial court's decision.

The trial court found merit in plaintiffs' contentions and held that the State Fish and Game Council cannot exclude an otherwise qualified individual from membership in that body solely because he is not a sportsman, farmer or commercial fisherman. *Humane Soc'y of U. S. v. State Fish & Game Council*, 129 N. J. Super. 239 (Ch. Div. 1974). Although his opinion considered a panoply of issues, Judge

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<sup>1</sup> In this regard, the delegation to the defendant-Council may readily be distinguished from the delegation to representative bodies of regulated professions. See, e. g., N. J. S. A. 45:9-1 (doctors), N. J. S. A. 45:11-24 (nurses). Unlike the delegations by those statutory provisions, the delegation under N. J. S. A. 13:1B-24 is not made to a professional body which is charged with the maintenance of professional standards. Similarly, the delegation to the Fish and Game Council does not concern a particularly esoteric subject. Thus, unlike the delegations to the medical and nursing professions the delegation under N. J. S. A. 13:1B-24 does not concern a matter for which knowledge is solely possessed by one particular group.



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Ciolino specifically found that there was insufficient reason to exclude plaintiffs from Council membership. In this regard, he stated:

The question to be determined is, can one reasonably conceive of any state of facts justifying the exclusion of a person from consideration for appointment to the Fish and Game Council who is knowledgeable and interested in conservation of fish and game simply because he isn't either a sportsman, farmer or commercial fisherman? Further, is it rational for the state to exclude a person from consideration for appointment and does such exclusion reasonably serve any legitimate objective, or is it arbitrary?

It is the opinion of this court that such exclusion is arbitrary and does not reasonably relate in any way to the office in question. The crucial factor determinative of one's qualification for membership of the Fish and Game Council is one's "knowledge of and interest in the conservation of fish and game." N. J. S. A. 13:1B-24. There appears to be no reason in logic as to why such person must be either a sportsman, farmer or commercial fisherman. [129 N. J. Super. at 245-46].

I fully agree with the trial judge's statement of the issue and with his conclusion that the classification in the statute is arbitrary. The majority today, however, rejects this rational and just result. In part, the Court bases its decision on plaintiffs' failure to demonstrate that "the term 'sportsman' does not include an environmentalist." *Ante* at 575. While information clearly within the realm of judicial notice should suggest the basis for this distinction, differ-

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ences between the interests advanced by plaintiffs and those of the Sportsmen's Federation were clearly established at trial. In fact, not only are plaintiffs' concerns distinguishable from those of the groups which are represented on the Council, but in certain instances they may be diametrically opposed. Sportsmen and environmentalists often (though not always) operate from different premises. The Council through its component organizations, for example, attempts to meet its conservation mandate solely by the regulation of hunting and the propagation of different species of animals. Plaintiffs, on the other hand, view conservation in terms of a broader ecosystem within which game animals and their relative numbers are merely singular components. This broader view of conservation is reflected in the greater range of activities in which plaintiffs participate. These activities, which include backpacking, camping and birdwatching are clearly affected both by the decisions of the Fish and Game Council and by the often adverse interests of the groups which are now represented on the Council. Thus, it would be meaningless for plaintiffs to affiliate themselves with groups whose interests they do not share. As the trial court correctly observed:

Your position as I understand it as to the corporate parties, is that they have a different policy, or they may have a different policy. Therefore, they do not wish to affiliate themselves with the Federation. And as to the individual [plaintiffs], that they do not wish to join because of their own personal feelings; and in addition thereto, they feel joining would not accomplish any purpose for them.

Therefore, to accept the majority's reasoning that plaintiffs' interests may be represented by the council because



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they are "sportsmen," is like a suggestion that an umpire's decision may be equally amenable to the affected parties because they all happen to be "baseball players."

In the final analysis, the majority itself concedes that this reasoning is of little moment. As it frankly observes, "even if we assume that the classification contemplates only hunters and fishermen, the statutory scheme is not unduly stringent." *Ante* at 575. I could only accept this jump in logic if I were prepared to abandon my position that the classifications are arbitrary in both their design and their practical effect. By delegating the nominating power to specific groups, none of whose interests coincides with those of plaintiffs, the appointment scheme in N. J. S. A. 13:1B-24 effectively precludes plaintiffs from ever achieving representation on a Council whose decisions directly affect their interests and activities. Surely, no scheme, statutory or otherwise, could operate more stringently than that! This situation, as the majority readily admits, "may be less than ideal" *Ante* at 579. Although it questions the necessity for affording representation to other particular special interest groups, the majority recognizes that representation of the general public would promote "a better balance" on the Council. This recognition, however, is unaccompanied by appropriate judicial action to implement its objective, and, in effect, perpetuates the existing system for Council selection. Moreover, I am not comforted in this regard by the majority's observation that "although sponsorship by the Sportsmen's Federation and the State Agricultural Convention is essential to appointment to the Fish and Game Council, membership in those organizations is not." *Ante* at 570. As both the State and the majority acknowledge, *ante* at 570-571 nominations presented by the Sportsmen's Fed-

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eration and the State Agricultural Convention have been limited to their own membership. In light of the divergent and potentially conflicting interests which are held by plaintiffs, I cannot rely on the hypothetical hope that their members will ever be nominated to the Council under the existing statutory scheme.

Even if plaintiffs' interests are not of constitutional dimension, as defendants and the majority contend, basic principles of fairness require that they be protected in the instant case. It has long been recognized in this State that where the Legislature prescribes qualifications for public office, even in the absence of a constitutional provision, it must not arbitrarily exclude any individual or group of individuals without regard to the pertinent qualifications. *Stothers v. Martini*, 6 N. J. 560 (1951); *Gansz v. Johnson*, 9 N. J. Super. 565 (Law Div. 1950). The standard against which all qualifications and exclusions must be measured is that of reasonableness. *Stevenson v. Gilfert*, 13 N. J. 496 (1953); *Gangemi v. Rosengard*, 44 N. J. 166 (1965). This standard remains immutable regardless of whether our consideration is a matter of "constitutional necessity" or "public relations."

Applying this standard to the present case, I am unable to conclude that the restrictions in N. J. S. A. 13:1B-24 are anything but arbitrary. Since the relevant criterion in that provision requires only that a member of the Fish and Game Council have "knowledge of and interest in the conservation of fish and game," it makes little sense to condition membership on sponsorship by any given group. This is not to say that the recommendations of groups such as the State Agricultural Convention and Sportsmen's Federation should not be considered or accorded weight in



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evaluating a candidate's credentials. Nonetheless, I cannot sanction a procedural practice which delegates the nominating power to a select circle of organizations to the exclusion of all other groups who demonstrate a sincere interest in the relevant subject matter.

I especially cannot sanction this practice where its practical effect will deprive an organization, whose interests are intimately affected by the decisions of the Fish and Game Council, of any chance to achieve the representation which it needs to protect those interests. Even if plaintiffs' interests did not conflict with those advanced by defendants, I could not approve of a scheme which forecloses from the chambers of authority a viewpoint which clearly promotes the very interests envisioned by N. J. S. A. 13:1B-24. While I recognize that groups such as the Sierra Club or the Humane Society occupied a less prominent position in 1948 when this statute was enacted, this is no reason to perpetuate a system which is blind to its own shortsightedness.

Accordingly, I would affirm the judgment of the trial court.

*For reversal*—Chief Justice HUGHES, Justices MOUNTAIN, SULLIVAN, CLIFFORD and SCHREIBER and Judge CON-FORD—6.

*For affirmance*—Justice PASHMAN—1.

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**Opinion of the Superior Court of New Jersey, Passaic County (129 N. J. Super. 239)**

The Humane Society of the United States, New Jersey Branch, Inc., a non-profit corporation of the State of New Jersey; The Sierra Club, Inc., a California non-profit corporation; Hermina C. M. Andrews and Fred Ferber, citizens and taxpayers of the State of New Jersey, Plaintiffs v. New Jersey State Fish and Game Council, an agency of the State of New Jersey; William T. Cahill, Governor of the State of New Jersey; The Senate of the State of New Jersey, and Alfred N. Beadleston, President thereof; The New Jersey State Federation of Sportsmen's Clubs, a non-profit association of the State of New Jersey, and Robert Smalley, President thereof; and the State of New Jersey, acting through the Agricultural Convention of the State of New Jersey, a public body organized under the Revised Statutes of New Jersey, Defendants.

Superior Court of New Jersey

Chancery Division

Decided June 12, 1974.

**SYNOPSIS**

Action challenging statutory procedure relating to persons eligible for appointment to the Fish and Game Council. The Superior Court, Chancery Division, Ciolino, J. S. C., held that the State might not exclude from consideration for appointment a person who is otherwise qualified merely because he is not a sportsman, farmer or commercial fisherman as provided by statute.

Judgment for plaintiffs.



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## 1. Constitutional law

## Fish

## Game

Fish and Game Council is a specialized unit of government which does not exercise what might be thought of as normal governmental authority so that the traditional equal protection test could be applied with respect to claim that the appointment to Fish and Game Council of only those persons who are farmers, sportsmen and commercial fishermen as required by statute, does not fairly represent all of the people. N. J. S. A. 13:1B-24, 28, 30; U. S. C. A. Const. Amend. 14.

## 2. Officers

Legislature may prescribe qualifications which reasonably relate to needs of office holding or to the specialized demands of an office whether the office is appointive or elective.

## 3. Officers

Legislature cannot enact arbitrary exclusions from office or from candidacy for office.

## 4. Constitutional law

## Fish

## Game

Statutory requirements that appointments to Fish and Game Council be made only from persons who are farmers, sportsmen or commercial fishermen violated equal protection since there was no rational basis for State to ex-

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clude from consideration the appointment of a person who was otherwise qualified simply because he was not a sportsman, farmer or commercial fisherman. N. J. S. A. 13:1B-24; U. S. C. A. Const. Amend. 14.

## 5. Officers

State is not precluded from imposing qualifications for those governmental positions created for the governance of public trust which are reasonably related to such governments.

## 6. Constitutional law

Legislative functions and responsibilities may not be delegated to private bodies which are not subject to public accountability at least where the exercise of such power is not accompanied by adequate legislative standards or safeguards.

## 7. Constitutional law

Legislature may delegate to administrative agency exercise of legislative power with respect to a specific subject matter but must furnish reasonably adequate standards to guide the agency so that it is not vested with arbitrary and unbridled power; exigencies of modern government increasingly dictate use of general rather than minutely detailed standards in regulatory enactments under police power.

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*Mr. Peter A. Buchsbaum* for plaintiffs.

*Mr. Leo J. Barrett* for defendant New Jersey State Federation of Sportsmen's Clubs and Robert Smalley.



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*Mr. John M. Van Dalen* for defendants New Jersey State Fish and Game Council, William T. Cahill, Governor of the State of New Jersey, the Senate of the State of New Jersey and Alfred N. Beadleston, State of New Jersey acting through the Agricultural Convention of the State of New Jersey (*Mr. William F. Hyland*, Attorney General of New Jersey).

*Mr. Paul A. Lenzini* for International Association of Game, Fish and Conservation Commissioners and the National Wildlife Federation, *amici curiae* (*Messrs. Chapman, Duff & Lenzini*, attorneys).

*Mr. Dennis C. Linken* for the New Jersey Council of Churches, *amicus curiae* (*Mr. Edward J. Insley*, P. A., attorney).

CIOLINO, J. S. C. This action has been submitted to the court on a limited stipulation of facts and legal argument. Plaintiffs Humane Society and Sierra Club are nonprofit organizations having many members who are interested in and knowledgeable about the conservation of fish and game in the State, and many members who use and enjoy the State's wildlife, parks, waters and open lands. These plaintiffs, along with the individual plaintiffs, wish an opportunity to participate in the decision-making process of defendant Fish and Game Council. Plaintiff corporations are not now members of the New Jersey State Federation of Sportsmen's Clubs and have not requested membership because of policy decisions and personal beliefs.

Plaintiffs question the composition of the Fish and Game Council as provided for in N. J. S. A. 13:1B-24. While they do not question the qualifications set forth in the statute, the thrust of the attack is to the origin of the

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nominations. The issue presented to the court is whether the process of appointing members to the Fish and Game Council is violative of the equal protection clause of the Fourteenth Amendment of the Federal Constitution and the concept of equal protection implicit in the New Jersey Constitution of 1947.

The part of the statute which is being questioned, N. J. S. A. 13:1B-24, provides as follows:

There shall be within the Division of Fish and Game, a Fish and Game Council which shall consist of eleven members, each of whom shall be chosen with due regard to his knowledge of and interest in the conservation of fish and game. Each member of the council shall be appointed by the Governor, with the advice and consent of the Senate. Three of such members shall be farmers, recommended to the Governor for appointment to the council by the Agricultural Convention held pursuant to the provisions of article two of chapter one of Title 4 of the Revised Statutes; six of such members shall be sportsmen, recommended to the Governor for appointment to the council by the New Jersey State Federation of Sportsmen's Clubs; and two of such members shall be commercial fishermen \* \* \*.

Plaintiff's contention is that the aforementioned provisions limit the prospective appointees of the Fish and Game Council to three categories of persons, *i.e.*, either sportsmen, farmers or commercial fishermen. Simply stated, the question is whether the State may exclude from consideration for appointment a person, otherwise qualified, because he is not a sportsman, farmer or commercial fisherman.



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Addressing itself first to the question of which standard of equal protection is to be applied in the case at bar, the court must consider whether to apply the traditional standard under which a legislative classification "must be sustained unless it is 'patently arbitrary' and bears no rational relationship to a legitimate governmental interest," *Frontiero v. Richardson*, 411 U. S. 677, 683, 93 S. Ct. 1764, 36 L. Ed. 2d 583 (1973), or the more stringent standard which may be termed "the compelling state interest standard." Under this second standard the essential inquiry would be whether the exclusions are "necessary to promote a compelling state interest." *Kramer v. Union Free School District*, 395 U. S. 621, 627, 89 S. Ct. 1886, 23 L. Ed. 2d 583 (1969). *Kramer, supra*, dealt with the classifications affecting the right to vote, and in that matter the Supreme Court applied the more stringent compelling state interest standard.

In *Kramer* the court said:

Accordingly, when we are reviewing statutes which deny some residents the right to vote, the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a "rational basis" for the distinctions made are not applicable [citations]. The presumption of constitutionality and the approval given "rational" classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality. [at 627-628, 89 S. Ct. at 1890]

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The court then reasoned that this would require an application of the more stringent standard.

As plaintiffs' complaint is that the appointive procedure to the Fish and Game Council does not fairly represent all of the people, it would appear at first blush that the more stringent standard should be applied herein. Plaintiffs' attack upon the selective process of a unit of government would appear similar to the issues presented in the voting rights cases. In *Turner v. Fouche*, 396 U. S. 346, 90 S. Ct. 532, 24 L. Ed. 2d 567 (1970), the issue presented was whether the more stringent equal protection standard should apply to a case involving exclusions from office-holding as distinguished from exclusion from voting. While the issue was presented, the court did not squarely answer the question because it decided the merits of the case apart from this issue. However, the court did say:

Subsequent to the ruling of the District Court, this Court decided *Kramer v. Union Free School District*, 395 U. S. 621, 89 S. Ct. 1886, 23 L. Ed. 2d 583, and *Cipriano v. City of Houma*, 395 U. S. 701, 89 S. Ct. 1897, 23 L. Ed. 2d 647. The appellants urge that those decisions require Georgia to demonstrate a "compelling" interest in support of its freeholder requirement for school board membership. The appellees reply that *Kramer* and *Cipriano* are inapposite because they involved exclusions from voting, not from office-holding. We find it unnecessary to resolve the dispute, because the Georgia freeholder requirement must fall even when measured by the traditional test for a denial of equal protection: whether the challenged classification rests on grounds wholly irrelevant to the achievement of a valid state objective. [at 362, 90 S. Ct. at 541]



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In the case of *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U. S. 719, 93 S. Ct. 1224, 35 L. Ed. 2d at 659 (1973), a case involving the limitation of the franchise as to the election of members of a special-purpose unit of government, the court applied the "traditional" standard. In that matter the unit of government was a water storage district with power to plan projects and execute approved projects "for the acquisition, appropriation, diversion, storage, conservation and distribution of water"; to acquire and operate necessary works and to fix tolls for the use of water. The Supreme Court found that the district did not exercise what might be thought of as the normal governmental authority.

[1] The Fish and Game Council likewise is a "special purpose" unit of government. It has the power to promulgate state fish and game codes "for the purpose of providing an adequate and flexible system of protection, propagation, increase, control and conservation of fresh water fish, game birds, game animals and fur-bearing animals in this State \* \* \*." N. J. S. A. 13:1B-30. It also has the power to formulate "comprehensive policies for the protection and propagation of fish, birds and game animals \* \* \*." N. J. S. A. 13:1B-28. Its function clearly is to deal with a specialized subject matter. Similar to the water storage district in *Salyer Land*, *supra*, the Fish and Game Council does not exercise what might be thought of as "normal" governmental authority. As the Supreme Court applied the traditional equal protection test to the questions involved in *Salyer Land*, I am of the opinion that the traditional test should be applied in the present case. In *Salyer Land* the court said:

But in the type of special district we now have before us, the question for our determination is not

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whether or not we would have lumped them together had we been enacting the statute in question, but instead whether "if any state of facts reasonably may be conceived to justify" California's decision to deny the franchise to lessees while granting it to the landowners. [at 732, 93 S. Ct. at 1231]

[2, 3] The Legislature may prescribe qualifications which reasonably relate to the needs of office-holding or to the specialized demands of an office. *Gangemi v. Rosengard*, 44 N. J. 166 (1965). The same is true where the office is appointive rather than elective. *Kohler v. Barnes*, 123 N. J. Super. 69 (Law Div. 1973). The Legislature, however, cannot enact arbitrary exclusions from office or from candidacy for office. *Gansz v. Johnson*, 9 N. J. Super. 565 (Law Div. 1950).

[4] The question to be determined is, can one reasonably conceive of any state of facts justifying the exclusion of a person from consideration for appointment to the Fish and Game Council who is knowledgeable and interested in conservation of fish and game simply because he isn't either a sportsman, farmer or commercial fisherman? Further, is it rational for the state to exclude such a person from consideration for appointment and does such exclusion reasonably serve any legitimate objective, or is it arbitrary?

It is the opinion of this court that such exclusion is arbitrary and does not reasonably relate in any way to the office in question. The crucial factor determinative of one's qualification for membership of the Fish and Game Council is one's "knowledge of and interest in the conservation of fish and game." N. J. S. A. 13:1B-24. There appears to be no reason in logic as to why such person



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must be either a sportsman, farmer or commercial fisherman.

[5] Plaintiffs have also urged in argument that their interest in the public trust in wildlife is impaired by N. J. S. A. 13:1B-24 because the statute vests the administration of that trust in a selective minority of citizenry. It should be noted that plaintiffs do not allege any misconduct by the Council or any mismanagement or depletion by it of the state's fish or other wildlife. The principle of the public trust doctrine is that there is some property common to all citizens. Because only a "transient usufructory possession" can be had of such property, "the wisdom of that law has placed it in the hands of the sovereign power, to be held, protected and regulated for the common use and benefit." *Arnold v. Mundy*, 6 N. J. L. 1, 71 (Sup. Ct. 1821). The State, however, is not precluded from imposing qualifications upon those governmental positions created for the governance of the public trust which are reasonably related to such governance. It is the opinion of this court that the question narrows down to whether the qualifications imposed by the state on such positions are arbitrary and unreasonable. Resolution of this inquiry obviates the necessity of deciding whether the public trust property is being governed for the benefit of private individuals.

[6, 7] The issue of whether there has been an unconstitutional delegation of legislative functions to the Council has also been raised. Legislative functions and responsibilities may not be delegated to private bodies which are not subject to public accountability, "at least where the exercise of such power is not accompanied by adequate legislative standards or safeguards \* \* \*." *Group Health Ins. of N. J. v. Howell*, 40 N. J. 436, 445 (1963). The

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Legislature has the power to delegate to an administrative agency the exercise of legislative power with respect to a specific subject matter. The Legislature, however, must furnish reasonably adequate standards to guide the agency so that it is not vested with arbitrary and unbridled power. *State v. Seligson*, 106 N. J. Super. 329, (App. Div. 1969). "But the exigencies of modern government have increasingly dictated the use of general rather than minutely detailed standards in regulatory enactments under the police power." *Ward v. Scott*, 11 N. J. 117, 123-124 (1952). The Fish and Game Council has the power to enact regulations as part of the Fish and Game Code of the State. By statute some are based on scientific investigation and research. N. J. S. A. 13:1B-31 & 32. A public hearing must be held prior to the adoption of any regulation. N. J. S. A. 13:1B-33. All such regulations are subject to judicial review. N. J. S. A. 13:1B-34. The purpose of the State Fish and Game Code is to provide "an adequate and flexible system of protection, propagation, increase, control and conservation of fresh water fish, game birds, game animals and fur-bearing animals \* \* \*." N. J. S. A. 13:1B-30. Each member of the Council is appointed by the Governor with the advice and consent of the Senate. N. J. S. A. 13:1B-24. Members of the Council may be removed by the Governor in accordance with N. J. S. A. 13:1B-26.

It is the determination of this court that under the authority of *Ward v. Scott*, *supra*, the standards set forth in the provisions of the statute, though couched in general language, are sufficient to negate any possible constitutional infirmity.

As a final point, plaintiff urges that impartial administration of the public trust in wildlife is violated by an



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inherently biased and defective delegation of the administration of this trust to a private group which has a pecuniary interest in promoting its particular goals. It is the opinion of this court that that argument must fall as there has been no fact adduced at trial to indicate that we are dealing with the regulation of an industry by persons engaged in that industry who may be pecuniarily motivated. The court cannot conceive of how the present members of the Council may have a pecuniary interest in its regulation. All serve without compensation. The court must reject any argument by plaintiff concerning the restriction of competition since this is not a matter involving the clashing of economic interest. Nothing has been adduced at trial which would indicate a favoring of one group over another or the protection and advancement of the economic interest of one group as against the competition.

For the reasons set forth aforesaid, it is the finding and determination of this court that the State may not exclude from consideration for appointment to the Fish and Game Council a person otherwise qualified because he is not either a sportsman, farmer or commercial fisherman.

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**Final Judgment of the Superior Court of New Jersey,  
Chancery Division—Passaic County**

(Filed—August 14, 1974)

SUPERIOR COURT OF NEW JERSEY  
CHANCERY DIVISION—PASSAIC COUNTY

DOCKET No. C-2024-72

*Civil Action*

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THE HUMANE SOCIETY OF THE UNITED STATES, NEW JERSEY  
BRANCH, INC., etc., et al.,  
Plaintiffs,

v.

NEW JERSEY STATE FISH AND GAME COUNCIL, etc., et al.,  
Defendants.

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THIS MATTER having been opened to the Court by Peter A. Buchsbaum, attorney for the plaintiffs, on April 15, 1974, and Leo J. Barrett, Esq., having appeared for defendants Al Bal and New Jersey State Federation of Sportsmen's Clubs, and John M. Van Dalen, Deputy Attorney General having appeared for the remaining defendants (Hon. William F. Hyland, Attorney General of New Jersey, attorney) and the Court having considered the stipulations of fact and the briefs and the arguments of counsel, and for the reasons given in the Court's writ-



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ten Opinion dated June 12, 1974, specifically, that the requirement in N.J.S.A. 13:1B-24 that six members of the defendant Fish and Game Council be sportsmen nominated by the defendant Federation of Sportsmen's Clubs, that three members of said Council be farmers nominated by the defendant Agricultural Convention, and that two members of said Council be commercial fishermen violates the Equal Protection Clause of the New Jersey and Federal Constitutions, it is on this 13 day August 1974,

ORDERED that the State may not exclude from consideration for appointment to the Fish and Game Council, a person otherwise qualified because he or she is not either a sportsmen, nominated by the Sportsmen's Federation; farmer, nominated by the Agricultural Convention; or commercial fisherman; and it is further

ORDERED that those portions of N.J.S.A. 13:1B-24 providing for nomination to the Fish and Game Council of sportsmen selected by the Sportsmen's Federation, farmers selected by the Agricultural Convention, and commercial fishermen, be declared unconstitutional, null, void, and of no effect; and it is further

ORDERED that the operation of the aforesaid provisions of N.J.S.A. 13:1B-24 be permanently enjoined and that each of the named defendants be permanently enjoined from taking any action pursuant to the portions of the Statute which have been declared void.

PETER CIOLINO, J.S.C.

**APPENDIX B****Relevant Statute****13:1B-24 CONSERVATION AND DEVELOPMENT****13:1B-24 Fish and Game Council; members; terms**

There shall be within the Division of Fish and Game, a Fish and Game Council which shall consist of eleven Members, each of whom shall be chosen with due regard to his knowledge of and interest in the conservation of fish and game. Each member of the council shall be appointed by the Governor, with the advice and consent of the Senate. Three of such members shall be farmers, recommended to the Governor for appointment to the council by the agricultural convention held pursuant to the provisions of article two of chapter one of Title 4 of the Revised Statutes;<sup>1</sup> six of such members shall be sportsmen, recommended to the Governor for appointment to the council by the New Jersey State Federation of Sportsmen's Clubs; and two of such members shall be commercial fishermen. One of such farmer representatives and two of such sportsmen representatives in the council shall be chosen from among residents of and of the following counties—Bergen, Essex, Hudson, Morris, Passaic, Sussex and Warren; one of such farmer representatives and two of such sportsmen representatives in the council shall be chosen from among residents of any of the following counties—Hunterdon, Mercer, Middlesex, Monmouth, Ocean, Somerset and Union; and one of such farmer representatives and two of such sportsmen representatives shall be chosen from among residents of any

<sup>1</sup> Section 4.1-1 et seq.



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of the following counties—Atlantic, Burlington, Camden, Cape May, Cumberland, Gloucester and Salem.

Each member of the council shall be appointed for a term of four years and shall serve until his successor has been appointed and has qualified; except that of the first appointments hereunder, two shall be for a term of one year, three for two years, three for three years, and three for four years, each commencing on April first following the date of appointment. The term of each of the respective first appointees to the council shall be designated by the Governor.

The persons in office as members of the Fish and Game Council in the Division of Fish and Game of the existing State Department of Conservation on the effective date of this act<sup>2</sup> shall constitute the Fish and Game Council established hereunder until the first day of April, one thousand nine hundred and forty-nine, at which time their respective terms of office shall expire, L. 1948, c. 448, p. 1797, § 26, eff. Oct. 25, 1948.

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<sup>2</sup> Section 13:1B-72.

**APPENDIX C**

(Filed—September 29, 1976)

**Notice of Appeal**

SUPREME COURT OF NEW JERSEY

A-136 September Term, 1975

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THE HUMANE SOCIETY OF THE UNITED STATES, NEW JERSEY BRANCH, INC., a non-profit corporation of the State of New Jersey; THE SIERRA CLUB, INC., a California non-profit corporation; HERMINA C. M. ANDREWS and FRED FERBER, Citizens and taxpayers of the State of New Jersey,

Plaintiffs-Respondents,

vs.

NEW JERSEY STATE FISH AND GAME COUNCIL, an Agency of the State of New Jersey; WILLIAM T. CAHILL, Governor of the State of New Jersey, THE SENATE OF THE STATE OF NEW JERSEY, and ALFRED N. BEADLESTON, President thereof; THE NEW JERSEY STATE FEDERATION OF SPORTSMEN'S CLUBS, a non-profit association of the State of New Jersey, and ROBERT SMALLEY, President thereof; and the STATE OF NEW JERSEY, acting through the AGRICULTURAL CONVENTION OF THE STATE OF NEW JERSEY, a public body organized under the Revised Statutes of New Jersey,

Defendants-Appellants.

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*Appendix C*

PLEASE TAKE NOTICE that The Humane Society of the United States, New Jersey Branch, Inc.; The Sierra Club, Inc.; Hermina C. M. Andrews and Fred Ferber, plaintiffs-respondents hereby appeal to the United States Supreme Court from the whole of the final judgment of the Supreme Court of New Jersey, dated July 15, 1976, in the above captioned case. This appeal is being taken under 28 U.S.C. § 1257(2).

PETER A. BUCHSBAUM  
Attorney for Plaintiffs-Respondents



IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1976

No. A-267

**76-660**

HUMANE SOCIETY OF THE UNITED STATES,  
NEW JERSEY BRANCH, INC., et al.,  
*Appellants,*

vs.

NEW JERSEY FISH AND GAME COUNCIL, et al.,  
*Appellees.*

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

**RESPONSE TO APPELLANTS'  
JURISDICTIONAL STATEMENT**

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. A-267

HUMANE SOCIETY OF THE UNITED STATES,  
NEW JERSEY BRANCH, INC., et al.,  
*Appellants,*

vs.

NEW JERSEY FISH AND GAME COUNCIL, et al.,  
*Appellees.*

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

RESPONSE TO  
JURISDICTIONAL STATEMENT

Appellants appeal from a final judgment of the Supreme Court of New Jersey entered on July 15, 1976 which sustained the constitutional validity of N.J.S.A. 13:1B-24. This Response to Appellant's Jurisdictional Statement is submitted to demonstrate that the Supreme Court of the United States should not exercise jurisdiction over this appeal in that a substantial question is not presented or, in any event, the judgment of the Supreme Court of the State of New Jersey is correct.

OPINIONS BELOW

The majority and dissenting opinions of the Supreme Court of New Jersey are reported at 70 N.J. 565 and — A.2d —. The opinion of the trial court which found the statute unconstitutional is reported in 129 N.J. Super. 239, 322 A.2d 841 (Ch. Div. 1974). These opinions are attached as Appendix A to the Jurisdictional Statement submitted by Appellants.



## JURISDICTION

This suit was brought in State Court under the Fourteenth Amendment to the United States Constitution in order to have N.J.S.A. 13:1B-24 declared unconstitutional and have its enforcement enjoined. The judgment of the Supreme Court of New Jersey was filed on July 15, 1976 and a Notice of Appeal was filed in that court on September 29, 1976. The Appellants assert that the jurisdiction of the United States Supreme Court to review this judgment by direct appeal is conferred by 28 U.S.C. §1257(2). The text of the statute involved is set forth as Appendix B to the Jurisdictional Statement submitted by Appellants.

## QUESTIONS PRESENTED

1) Is a New Jersey statute requiring that the membership of the New Jersey Fish and Game Council be composed of six sportsmen nominated by a federation comprised almost exclusively of hunters and sportsmen, three farmers nominated by an agricultural organization, and two commercial fishermen, so unreasonable as to violate the Equal Protection Clause of the Fourteenth Amendment?

2) Does the participation of the New Jersey Federation of Sportsmen's Clubs and of an Agricultural Convention in recommending to the Governor persons for membership on the Fish and Game Council constitute a violation of due process of law?

## STATEMENT OF THE CASE

The New Jersey Fish and Game Council is an eleven-member governmental body within the Division of Fish, Game and Shell Fisheries in the Department of Environmental Protection. N.J.S.A. 13:1D-1; N.J.S.A. 13:1D-4. It has certain statutory powers over the protection, propagation, and use of New Jersey's fish, birds and other game animals. Pursuant to N.J.S.A. 13:1B-28, the Council is charged with developing, subject to the approval of the Commissioner of the Department of Environmental Protection, a comprehensive State policy with respect to the protection and propagation of wildlife. The Council also has regulatory control over the manner in which hunting or fresh water fishing is permitted in the State. N.J.S.A. 13:1B-30, *et seq.* To this end, the Council is empowered to establish a State Fish and Game Code regulation "... under what circumstances, when and in what localities, by what means and in what amounts and numbers such fresh water fish, game birds, game animals, and fur-bearing animals, or any of them, may be pursued, taken, killed, or had in possession. . . ." N.J.S.A. 13:1B-30.

The procedure for recommendations and appointments to the New Jersey State Fish and Game Council are set forth in N.J.S.A. 13:1B-24:

There shall be within the Division of Fish and Game, a Fish and Game Council which shall consist of eleven members, each of whom shall be chosen with due regard to his knowledge of and interest in the conservation of fish and game. Each member of the council shall be appointed by the Governor, with the advice and consent of the Senate. Three of such members shall be farmers, recommended to the Governor for appointment to the council by the Agricultural Convention held pursuant to the provisions of article two



of chapter one of Title 4 of the Revised Statutes; six of such members shall be sportsmen, recommended to the Governor for appointment to the council by the New Jersey State Federation of Sportsmen's Clubs; and two of such members shall be commercial fishermen\*\*\*.

The Council has 11 members, all appointed by the Governor with the advice and consent of the Senate. Of the eleven, three are "farmers," chosen by the Governor from recommendations submitted by the state Agricultural Convention. N.J.S.A. 4:1-4. Six members are "sportsmen," chosen by the Governor from recommendations submitted by the New Jersey State Federation of Sportsmen's Clubs. The two remaining members are "commercial fishermen." Each member is to be chosen "with due regard to his knowledge of and interest in the conservation of fish and game." N.J.S.A. 13:1B-24.

There is no statutory requirement that those recommended for appointment to the Fish and Game Council by the Governor be members of any of the recommending organizations.

Appellants initiated this suit in February 1973 challenging, on equal protection and due process grounds, the constitutionality of the subject statute. The trial court (which heard the case on what it called "a limited stipulation of facts and legal argument"), held the statute unconstitutional, 129 N.J.S. 239 (Ch. Div. 1974).

Plaintiffs are two non-profit organizations, the Humane Society of the United States, New Jersey Branch, and the Sierra Club, and two individuals who are tax payers and citizens of the State of New Jersey. They contend that the Fish and Game Council membership statute is constitutionally defective because it enumerates three classes of appointees to the Council—sportsmen, farmers, and com-

mercial fishermen—and excludes from appointment any person who is not recommended to the Governor by either the State Agricultural Convention or the New Jersey State Federation of Sportsmen's Clubs (hereafter Sportsmen's Federation). In essence, plaintiffs characterize their exclusion from the ranks of those eligible for appointment to the Council as a denial of equal protection. In addition, they contend that the statutory delegation of the power of appointment to a private organization such as the Sportsmen's Federation would violate due process. The trial court's opinion upheld plaintiffs position and ruled that a person otherwise qualified may not statutorily be excluded from appointment to the Fish and Game Council on the ground that he or she is not either a sportsman, farmer, or a commercial fisherman.

On July 15, 1976, the New Jersey Supreme Court reversed in a 6 to 1 decision which sustained the validity of the statute. The Court held that the statute satisfies the requirements of the equal protection clause since the grant of access to Council membership was rational given the specialized and limited nature of Council activities. The role of private organizations in the nominating process was similarly sustained against appellants due process argument.

The Division of Fish, Game and Shell Fisheries and the Fish and Game Council are dependent upon revenues from hunting and fishing licenses to finance their activities.



## ARGUMENT

Appellants seek review of the decision of the Supreme Court of New Jersey by this Court pursuant to 28 U.S.C. §1257(2) and assert that the questions presented are of substantial public importance. Insofar as the significance of the questions presented is concerned, the Supreme Court of the State of New Jersey concluded as follows with respect to the powers and activities of the New Jersey Fish and Game Council:

"The Fish and Game Council is invested with certain regulatory powers aimed at protecting and developing an adequate supply of fish and game for recreational and commercial purposes. These powers are expressed primarily by the Council's determination as to when and where in the State hunting and fishing shall take place and which fresh water fish, game birds, game animals, and fur-bearing animals may be taken and in what numbers. The wildlife thus regulated are those animals which are the focus of the sports of hunting and fishing."

The Court also noted that the Fish and Game Council supervises a program of wildlife propagation, the expenses of which are supported by fees from hunting and fishing licenses paid for by sportsmen and commercial fishermen. Parenthetically, the Court concluded that the regulation of endangered species does not fall within the scope of the Council's powers and duties. Thus, given the rather limited and specialized nature of the duties and responsibilities of the New Jersey Fish and Game Council, it is respectfully submitted that no substantial question is presented on this appeal.

Under any circumstances, it is further submitted that the conclusion of the New Jersey Supreme Court was cor-

rect in all respects. Obviously, all legislative classifications do not fall as being violative of constitutional standards. As the New Jersey Supreme Court noted below:

"Equal protection does not require that all persons be dealt with identically. If there is some reasonable basis for the recognition of separate classes, and the disparate treatment of the classes has a rational relation to the object sought to be achieved by the lawmakers, the constitution is not offended. [*New Jersey Chapter, American Institute of Planners, v. New Jersey State Board of Professional Planners*, 48 N.J. 581, 601, appeal dismissed, 389 U.S. 8, 88 S. Ct. 70, 19 L.Ed.2d 8 (1967)]

The New Jersey Supreme Court concluded that the trial court correctly applied to the Council membership statute the minimum scrutiny, rational basis test, which looks to whether a state of facts exists that could reasonably justify the legislative scheme, citing *Salier Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719, 93 S. Ct. 1224, 35 L.Ed.2d 659 (1973). In that case, this Court rejected an equal protection challenge directed against provisions in the Water Code of the State of California which established voter qualifications for electing the directors of water storage districts in the state. Only landowners were eligible to vote and the votes were apportioned according to the assessed valuation of the land. That qualification was found acceptable despite the fact that it impinged on the franchise, because landowners as a class bore the entire burden of the costs of the water district and the state "could rationally conclude that they, to the exclusion of residents, should be charged with responsibility for (the district's) operation" 410 U.S. 731, 93 S.Ct. 1231, 35 L.Ed.2d 65.

The New Jersey Supreme Court went on to state as follows:



"Here, as in *Slayer*, a particularized unit of government is implicated and the persons who achieve office do not have plenary powers. The Fish and Game Council is a specialized body, with statutorily prescribed duties and statutory limits on its powers and activities. Its members serve by appointment, not by election. Access to the Council cannot be said to be entwined with the fundamental right to vote, which would call for this Court to use the stricter, close scrutiny standard of review and would rebut the presumption of validity the statute now enjoys. *Bullock v. Carter*, 405 U.S. 134, 92 S. Ct. 849, 31 L. Ed. 2d 92 (1972); *Kramer v. Union Free School District*, 395 U.S. 621, 89 S. Ct. 1886, 23 L. Ed. 2d 583 (1969).

The burden, then, is on plaintiffs to demonstrate that the impact upon them of the Fish and Game Council's decisions is so significant and substantial as to render a statutory scheme which effectively bars from them appointment to the Council patently arbitrary and unreasonable. Only upon such a showing can their non-membership in this specialized body assume the dimensions of a constitutional deprivation.

It is clear, as recognized by the New Jersey Supreme Court, that the qualifications set forth in the challenged statute are reasonably related to the work of the Fish and Game Council. Farmers can be expected to bring to the Council knowledge of how agricultural uses of land can best be harmonized with the maximum propagation of wildlife. Sportsmen certainly have the keenest of interests in insuring an abundant supply of wildlife for all sporting activities as well as the development of nondepleting and safe hunting and fishing practices. Commercial fishermen owe their very livelihood to the continued plentiful supply of good fish, and to that end can be expected to be knowledgeable regarding the need to conserve fish life and to act wisely in fostering the propagation and ecologically

sound harvesting of such fish to the benefit of all New Jersey citizens.

Thus, that the Legislature has consciously decided that the expertise of such individuals is necessary to the proper management of wildlife in this State is a perfectly rational decision. Whether, as plaintiffs contend, there are other non-farming, hunting or fishing groups that could aid in the proper management of wildlife is beside the point, as the question before this Court is the constitutional right of the Legislature to select the groups in question and not to second guess the wisdom of that choice.

That the plaintiffs might prefer a different substantive policy, or a less stringent set of qualifications, does not render the existing statute unconstitutional. Legislative classifications need only be reasonable, not utopian:

In recognizing that the subject statute specifies that six of eleven Council members must be sportsmen, the New Jersey Supreme Court stated:

"Assuming this category consists of hunters and fishermen of the state, it is difficult to conceive of a group with a keener interest in maintaining a plentiful supply of game, in developing regulations to insure safety in hunting, and in overseeing the operations of the state's hatching and game farm and its stocking activity."

Notwithstanding Appellant's assertion as to the alleged broad powers of the Fish and Game Council, the Supreme Court of the State of New Jersey correctly concluded that "the dominion of the Fish and Game Council is \* \* \* confined," setting forth in its opinion such limitations (Appendix 14a) and further that "the Council does not have unfettered authority to decide that hunting or fishing will take place on private property, see *N.J.S.A.*



23:7-1), or on state owned lands. The Supreme Court of New Jersey went on to state; "the consignment of the specialized powers and duties flowing from this legislative scheme to so-called special interest groups has a rational basis, because these entities are most directly affected by the Council's regulations and possess the requisite expertise for achievement of the statutory objective." In passing, the Supreme Court of New Jersey also noted that professional boards established by state statutes "almost uniformly have a majority membership made up of representatives of the regulated profession," noting specifically boards regulating doctors and nurses and stating further that when "measured against this legislative scheme, which entrusts the interested parties rather than the general public the management of particular professions, the Fish and Game Council's membership statute is neither untoward or surprising."

Furthermore, it is respectfully submitted that the Supreme Court of New Jersey was correct in concluding that the challenged statute should be sustained not only under the rational basis test, but even under the more stringent "means focused" test which it had otherwise used to "determine constitutional challenges asserting interests more fundamental than the ones advanced by these plaintiffs." (Citing *Boro of Collingswood v. Ringgold*, 66 N.J. 350 (1975), *appeal dismissed* — U.S. —, 96 S.Ct. 2220, 48 L.Ed.2d 826 (1976). In concluding its rejection of the Equal Protection argument advanced by Appellants, the New Jersey Supreme Court aptly stated:

"The governmental interest in establishing regulations to ensure a plentiful supply of game animals for consumption and sport is suitably furthered by placing a degree of regulatory control in the hands of a Fish and Game Council composed of sportsmen, farmers, and commercial fisherman. Opening the Council's membership to persons with differing philosophies

might reflect the art of public relations, but it is not a constitutional necessity."

Plaintiffs further contend that the role played by the Agricultural Convention and by the Sportsmen's Federation in recommending to the Governor nine of the eleven appointees to the Council is offensive to due process of law because it produces a body incompletely representative of the public interest.

The New Jersey Supreme Court rejected this argument citing *Driscoll v. Sakin*, 121 N.J.L. 225 (Sup. Ct. 1938) *aff'd*, 122 N.J.L. 414 (E. & A. 1939), asserting that the delegation of nominating authority to private persons is not in derogation of the constitution where that document is silent as to the appointment of public officials. Interestingly enough, the Court noted an appointive scheme relating to a statutory body known as the New Jersey Natural Lands Trust, N.J.S.A. 12:IV-15.119 *et seq.*, which is similar to the appointment method plaintiffs challenge in this case. The Natural Lands Trust, which has trusteeship powers relating to natural areas preservation is composed of eleven members, six of whom are appointed by the Governor "from a list of candidates nominated by a nominating committee provided by a group of non-profit New Jersey Corporations having open space preservation or environmental education as their corporate purpose,\*\*\*." N.J.S.A. 12:1B-15:120. The Supreme Court concluded that plaintiffs in the instant case, particularly the Sierra Club, have interests analogous if not identical to the corporate purposes defined in that statute. And yet, obviously, the Sierra Club has not complained about that statutory scheme.

As the New Jersey Supreme Court noted, even delegation of legislative authority to private parties may withstand constitutional challenges if sufficient safeguards exist to prevent arbitrary concentration of power in per-



sons or groups motivated by self-interest. Citing *Male v. Renda Contracting*, 64 N.J. 199, *cert. den.* 419 U.S. 839, 95 S. Ct. 69 42 L.Ed.2d 66 (1974) the Court stated that "the test is whether the particular delegation is reasonable under the circumstances considering the purpose and aim of the Statute." In the *Male* case, a statute which fixed the wage rate for public works was geared to wages for particular crafts or trades fixed by collective bargaining agreements in the locality. While it was alleged in that case that the delegation to groups who negotiated these agreements created a danger of self motivated action, no actual harm to the public good was shown. Not only has no harm to the public been shown in regard to the statutory scheme under consideration here, but as the New Jersey Supreme Court stated, here no such harm has ever been alleged.

It is submitted that the conclusion of the New Jersey Supreme Court on the question of due process is correct and should stand:

"Our review of the limitations on the Fish and Game Council's authority, which limitations serve to promote other interests, convinces us that there does not reside in that body the potential for such aggrandizement of the Council members' interests as would be repugnant to due process."

Respectfully submitted,

FISCHER & KAGAN,  
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*New Jersey State Federation of*  
*Sportsmen's Clubs*

JAY D. FISCHER  
*On the Statement*



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1976

**No. 76-660**

THE HUMANE SOCIETY OF THE UNITED STATES, NEW JERSEY BRANCH, INC., a nonprofit corporation of the State of New Jersey; THE SIERRA CLUB, INC., a California nonprofit corporation; HERMINA C. M. ANDREWS and FRED FERBER, citizens and taxpayers of the State of New Jersey,

*Appellants,*

v.

NEW JERSEY STATE FISH AND GAME COUNCIL, an agency of the State of New Jersey; WILLIAM T. CAHILL, Governor of the State of New Jersey; THE SENATE OF THE STATE OF NEW JERSEY and ALFRED N. BEADLESTON, President thereof; THE NEW JERSEY STATE FEDERATION OF SPORTSMEN'S CLUBS, a nonprofit association of the State of New Jersey, and ROBERT SMALLEY, President thereof; and the STATE OF NEW JERSEY, acting through the AGRICULTURAL CONVENTION OF THE STATE OF NEW JERSEY, a public body organized under the Revised Statutes of New Jersey,

*Appellees.*

**On Appeal from the Supreme Court of New Jersey**

**MOTION TO DISMISS AND BRIEF IN SUPPORT THEREOF**

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IN THE  
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OCTOBER TERM, 1976

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**No. 76-660**

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THE HUMANE SOCIETY OF THE UNITED STATES,  
NEW JERSEY BRANCH, INC., a nonprofit corpora-  
tion of the State of New Jersey; THE SIERRA  
CLUB, INC., a California nonprofit corporation;  
HERMINA C. M. ANDREWS and FRED FERBER,  
citizens and taxpayers of the State of New Jersey,

*Appellants,*

v.

NEW JERSEY STATE FISH AND GAME COUNCIL,  
an agency of the State of New Jersey; WILLIAM T.  
CAHILL, Governor of the State of New Jersey; THE  
SENATE OF THE STATE OF NEW JERSEY and  
ALFRED N. BEADLESTON, President thereof; THE  
NEW JERSEY STATE FEDERATION OF SPORTS-  
MEN'S CLUBS, a nonprofit association of the State of  
New Jersey, and ROBERT SMALLEY, President  
thereof; and the STATE OF NEW JERSEY, acting  
through the AGRICULTURAL CONVENTION OF  
THE STATE OF NEW JERSEY, a public body  
organized under the Revised Statutes of New Jersey,

*Appellees.*

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**MOTION TO DISMISS AND BRIEF IN SUPPORT  
THEREOF**



### **Motion to Dismiss**

Pursuant to Rule 16(1)(b) of this Court, the Attorney General of the State of New Jersey, on behalf of appellees, New Jersey State Fish and Game Council, the Governor of New Jersey, the New Jersey State Senate, the Senate President and the Agricultural Convention of the State of New Jersey, hereby moves to dismiss this appeal on the grounds that it does not present a substantial federal question.

### **Question Presented**

Does the Equal Protection Clause of the Fourteenth Amendment prohibit a state from limiting membership on the state agency responsible for promoting and regulating hunting and fishing to individuals who are sportsmen, farmers or fishermen?

### **Counter-Statement of the Case**

The New Jersey Fish and Game Council, a governmental agency within the Division of Fish, Game and Shellfisheries in the Department of Environmental Protection (N.J.S.A. 13:1D-4), is a special purpose unit of government comprised of eleven members with limited statutory powers over the propagation and recreational use of New Jersey's fresh water fish, game birds and game and fur-bearing animals. The Council is empowered to establish a State Fish and Game Code regulating "... under what circumstances, when and in what localities, by what means and in what amounts and numbers such fresh water fish, game birds, game animals, and fur-bearing animals, or any of them, may be pursued, taken, killed, or had in

possession. . . ." N.J.S.A. 13:1B-30. The regulatory control of the Council is limited to that portion of the State's wildlife that has by statute and common usage been the subject of hunting and fresh water fishing. For example, N.J.S.A. 13:1B-30 limits the Fish and Game Code to "game birds", which are defined by N.J.S.A. 23:4-49 to include only some 21 species of the many birds found in New Jersey. Another statute, N.J.S.A. 23:4-1, further restricts the Council's power over even game birds by prohibiting hunting for all but six of the 21 game bird species unless the United States Department of Interior has prescribed an open season and set bag limits. Similarly, N.J.S.A. 13:1B-30 limits the regulatory power of the Council to "game animals" and "fur-bearing animals". See also, N.J.S.A. 23:3-1; N.J.S.A. 23:4-1; and N.J.S.A. 23:4-42.

In furtherance of these hunting and fishing responsibilities, the Council has been given charge over the conduct and control of State owned hatching stations and game farms. N.J.S.A. 23:2-2; N.J.S.A. 23:8-1. It also has been authorized to "stock with fish, birds and game only such lands and waters" as are open to anglers and hunters (N.J.S.A. 23:2-3) and to lease game refuge land, N.J.S.A. 23:8-7. Furthermore, the Council has the power to regulate animals that menace agricultural crops. N.J.S.A. 23:4-63.3.

Membership on the special purpose Council is obtained, for nine of its eleven members, through a three tiered process. The statute challenged by appellants, N.J.S.A. 13:1B-24, provides that:

"There shall be within the Division of Fish and Game, a Fish and Game Council which shall consist of eleven members, each of whom shall be chosen with due regard to his knowledge of an interest in the conservation of fish and game. Each member



of the council shall be appointed by the Governor, with the advice and consent of the Senate. Three of such members shall be farmers, recommended to the Governor for appointment to the council by the agricultural convention held pursuant to the provisions of article two of chapter one of Title 4 of the Revised Statutes; six of such members shall be sportsmen, recommended to the Governor for appointment to the council by the New Jersey State Federation of Sportsmen's Clubs; and two of such members shall be commercial fishermen."

Thus, the three farmer members are first recommended to the Governor by the State Agricultural Convention, then nominated by the Governor, if he accepts the recommendations, and finally appointed with the advice and consent of the Senate. The process for selecting the six sportsmen members is similar, differing only in that recommendations are made by the New Jersey State Federation of Sportsmen's Clubs. N.J.S.A. 13:1B-24 does not require the sportsmen or farmers so recommended to be a member of any sportsmen club or agricultural association. The two commercial fishermen members are simply nominated by the Governor and appointed with the advice and consent of the Senate without a recommendation by any group.

The Supreme Court of New Jersey, in upholding the constitutionality of the statutory method of appointment of members of the Council, expressly found that the Council is a "specialized body" and that its members do not have "plenary powers" (App. A at 9-10). The Court also noted that the Council's authority has been circumscribed by various administrative and judicial controls. It therefore concluded that "[t]he consignment of the specialized

powers and duties flowing from this legislative scheme to so-called special interest groups has a rational basis, because these entities are most directly affected by the Council's regulations and possess the requisite expertise for achievement of the statutory objective" (App. A at 15-16).

## ARGUMENT

**The appellants have not presented a substantial constitutional question entitling them to appeal as of right, because the limitation of membership on the New Jersey Fish and Game Council to sportsmen, farmers and fishermen is rationally related to the limited statutory functions of that agency and therefore is consistent with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.**

The law has always recognized that office holding is not an unfettered, fundamental right. *Snowden v. Hughes*, 321 U.S. 1 (1943). Rather, a state has broad freedom in deciding on eligibility for a particular office, and it may impose such requirements for appointment as are reasonable in light of the legislatively created specialized demands of the office. The one constraint imposed by the Equal Protection Clause on the criteria of eligibility for public office selected by a state is that a challenged classification may not rest "... on grounds wholly irrelevant to the achievement of a valid state objective." *Turner v. Fouche*, 396 U.S. 346, 362 (1970). Cf. *Salyer Land Co. v. Tulare Lake Basin Water Stor. Dist.*, 410 U.S. 719 (1973).



There is no substantial basis for the appellants' claim that the criteria of eligibility for appointment to the New Jersey Fish and Game Council are wholly irrelevant to any valid state objective. The qualifications in question, that members of the Council must be farmers, sportsmen and commercial fishermen, flow from the specialized powers and duties of the office and are rationally designed to insure the selection of qualified individuals who are philosophically attuned to the legislative purpose in creating the Council and vesting it with its limited and unique functions. The Council's basic duty is to regulate the hunting and fishing of game birds as defined by N.J.S.A. 23:4-49, game animals, fur-bearing animals, and fresh water fish, and to conserve, propagate and maintain an adequate supply of such game for the public's use through recreational hunting and fishing and as a food supply. N.J.S.A. 13:1B-30. This authority is circumscribed by the statutory setting of hunting seasons and bag limits for most species. N.J.S.A. 23:4-1, *et seq.*; N.J.S.A. 23:4-39; N.J.S.A. 23:4-58.1; N.J.S.A. 23:5-1, *et seq.* Other powers of the Council, as previously set forth, relate to the propagation of game through control over hatching stations and game farms, control over the stocking of land and water with game species, and control over animals that menace agricultural crops. In short, the Fish and Game Council deals only with hunting and fishing and related activities as well as with protection of agricultural crops, and then only within narrow statutorily defined tolerances.\*

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\* The Council does not have any authority to decide that hunting or fishing will take place on any privately or State owned land. Private land may not be hunted on against the owner's wishes,

*(Footnote continued on following page)*

Therefore, it can readily be seen that the selection of sportsmen was a rational choice. Sportsmen, the hunters and fishermen of the State, have the keenest interest in insuring the bountiful supply of game birds and game animals and fresh water fish. There is no other group which could be counted on to be as devoted to the proper operation of the State's hatching stations and game farms and to see that the State's stocking activities were carried out in the most effective manner. Sportsmen are also self-motivated to develop regulations insuring safety in hunting. Therefore, there is no other group that is by experience and motivation as well suited to produce qualified members to exercise the Council's authority and duties over hunting and fishing and related activities.

Similarly, the selection of farmers for inclusion on the Council was a rational decision. Farmers are by experience and training the most knowledgeable group in our society on the interaction of wildlife and agricultural activities. A farmer's insight into the sometimes vexious problem of maintaining a maximum game population in harmony with bountiful crop production is a tremendous benefit to the Council in carrying out its functions. Hunting, breeding and stocking decisions all must take into

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*(Footnote continued from preceding page)*

N.J.S.A. 23:7-1, and decisions as to the competitive merits of hiking, canoeing or camping as opposed to hunting or fishing (assuming for argument sake that the activities conflict) are vested in other agencies of the State such as the Division of Parks and Forestry. See *e.g.*, N.J.S.A. 13:1B-15.101 and 104. The power of the Council in N.J.S.A. 13:1B-30 to set territorial hunting or fishing limits is simply in aid of its duty to insure an abundant supply of game and not a grant of authority to mandate such activity on any particular tract of land against the wishes of the owner.



account their impact on this extremely important segment of the State's economy. Also, the Council's authority over animals that menace agricultural crops can be more wisely exercised with the input of the three farmer members.

Finally, the selection of commercial fishermen to serve on the Council was a rational decision because of the knowledge and experience they can bring to the decision making process regarding fishing, fish propagation and stocking. Clearly, commercial fishermen, dependent as they are on the abundant supply of salt water species for their very livelihood, can be counted on to be motivated towards sound decision making over the fresh water fishing activities controlled by the Council.

The experience, training, motivation and specialized knowledge of the three groups amply supports the deliberate decision of the Legislature that they are appropriate ones to insure the propagation, proper management, and safe hunting and fishing of the game species of wildlife in this State.

These criteria of eligibility for appointment also insure that the personnel who will be appointed to the Council are sympathetic to the legislatively ordained purposes of that body. The basic grant of power to the Fish and Game Council, N.J.S.A. 13:1B-30, expresses the Legislature's intent to regulate hunting and fishing in a manner that will conserve and maintain an adequate and proper supply of the game birds, game animals, fur-bearing animals and fresh water fish of the State for the public's use through recreational hunting and fishing and as a food supply. The Legislature quite clearly chose to regulate the game species of wildlife in this State with hunting and fishing actively in mind, and also quite clearly set the criteria for appointment to the Council so as

to orient the Council's membership towards that legislatively decreed policy. Although the Legislature could have set forth its policy towards hunting and fishing in an even more detailed manner than it already has, thereby obviating the need for a Council, or vested the functions performed by the Council in the Division of Fish, Game and Shellfisheries to be carried out by an anonymous staff, it did not do so. Instead, the Legislature chose the present highly visible method of regulation by a group of farmers, sportsmen, and commercial fishermen. In so doing, the Legislature has acted in a rational and traditional fashion to further a perfectly legitimate policy decision. Therefore, the appellants' equal protection challenge to the New Jersey statutory plan is clearly lacking in substance.

The appellants' attack upon the provision that six members of the Council be recommended to the Governor by the Sportsmen Federation and three by the State Agricultural Convention is also lacking in substance. The Sportsmen Federation, which every sportsmen's club in the State with 25 or more members is eligible to join (N.J.S.A. 13:1B-25), is particularly well suited to recommend sportsmen who are best equipped by experience and knowledge to regulate the subject of fish and game. Similarly, the State Agricultural Convention, which represents a broad cross section of county agricultural boards and private agricultural groups, is ideally suited to select farmers who have the greatest familiarity with the impact of hunting upon agricultural pursuits. There is, therefore, nothing irrational about the legislative decision to provide that nominations of sportsmen to the Council shall be by recommendation of the Sportsmen's Federation and nominations of farmers by recommendation of the Agricultural Convention. It also should be



clearly noted that the challenged power is solely one to recommend. If the person recommended is unsatisfactory, he always can be rejected by the Governor or the Legislature. This recommending process is also fully consistent with the systems of appointment employed with respect to various state agencies in New Jersey and elsewhere, the constitutionality of which have been consistently upheld. *Driscoll v. Sakin*, 121 N.J.L. 225, 1 A. 2d 881 (S. Ct. 1938), *aff'd per curiam*, 122 N.J.L. 414 (E. & A. 1939); *Seidenberg v. Bd. of Medical Examiners*, 80 N.M. 135, 452 P.2d 469 (Sup. Ct. 1969); *Lanza v. Wagner*, 11 N.Y. 2d 317, 183 N.E.2d 670 (Ct. App. 1962), *app. dismissed for lack of substantial fed. question*, 371 U.S. 74, *cert. den.*, 371 U.S. 901 (1962); *Floyd v. Thornton*, 220 S.C. 414, 68 S.E.2d 334 (Sup. Ct. 1954); *Elrod v. Willis*, 3055 Ky. 224, 203 S.W.2d 18 (1947); *Annotations*, 42 Am. Jur. 953; 97 A.L.R. 2d 363. *Note*, 32 Col. L. Rev. 80 (1932).

This Court too has previously recognized that the specialized responsibilities of a public agency may furnish a rational basis for special provisions for appointment or election thereto. In *Salzer Land Co. v. Tulare Lake Basin Water Stor. Dist.*, *supra*, the Court rejected a challenge on equal protection grounds to a statutory scheme under which the directors of water storage districts, with comprehensive authority over regional water supply and flood projects, were elected solely by landowners whose votes were weighed in accordance with the extent of their land holdings. The Court held that the "special limited purpose" of a water storage district and "the disproportionate effect of its activities on landowners as a group" provided a rational basis for thus limiting the franchise in electing its directors.

The special provisions for appointment to the Council are even more clearly grounded in the specialized de-

mands of the office. Since the Council is an appointive administrative body whose responsibilities are limited to promoting and regulating hunting and fishing, its authority is specialized and limited. Furthermore, since the Council's discretionary powers are limited by the enabling legislation under which it operates, the authority of the Council, even within its limited sphere, is carefully circumscribed by the enactments of a democratically elected state legislature.

The appellants' attempt to ascribe a broader range of responsibilities to the Council are not supported by the record which was before the state courts or the statutes on which they rely. Thus, while the members of the Council do possess statutory law enforcement powers by virtue of their offices, the actual enforcement of the fish and game is primarily carried out by full time paid conservation officers who must be selected on the basis of merit and fitness as a part of the State's classified civil service. N.J.S.A. 23:2-4. Furthermore, the staff of the agency, including its law enforcement personnel, are not subject to the direction of the Council, as implied by the appellants, but rather are subject to the supervision of the Director of the Division of Fish and Game, whose appointment must be approved by the Governor. N.J.S.A. 13:1B-27. Furthermore, while Council does exercise some power over the Director, he is also subject to the immediate supervision and direction of the Commissioner of Environmental Protection (N.J.S.A. 13:1B-27, N.J.S.A. 13:1D-4), a cabinet level official appointed by the Governor with the advice and consent of the Senate. N.J.S.A. 13:1D-1. See also N.J.S.A. 13:1A-14. Finally, the Council has no authority whatever over the areas of wildlife management of greatest concern to the public generally, such as the protection of endangered species (N.J.S.A. 23:2A-1), and the only general authority it has over wildlife



planning and management is subject to the approval of the Commissioner of Environmental Protection. N.J.S.A. 13:1B-28. Therefore, it is plain that the appellants, apparently to avoid the controlling force of *Sayler Land Co. v. Tulare Lake Basin Water Stor. Dist.*, *supra*, paint an exaggerated picture of the powers of the Council.

In short, the Legislature has the constitutional right to establish rational criteria for appointive office holding, and its decisions with respect thereto should not be overturned unless they are patently arbitrary. At present the New Jersey Legislature, acting in democratic fashion and in furtherance of what must be conceded to be the sentiments of the majority of New Jersey citizens, has placed the responsibility for the regulation of hunting and fishing in the hands of sportsmen, farmers, and fishermen. Since there are cogent reasons for this legislative determination, it presents no substantial constitutional question under either the Equal Protection or Due Process clauses of the Fourteenth Amendment.

## CONCLUSION

**It is respectfully submitted that for the foregoing reasons the appeal should be dismissed for lack of a substantial federal question.**

Respectfully submitted,

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